COCAINE AND FEDERAL SENTENCING POLICY

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

JUNE 29, 1995

Serial No. 19

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COCAINE AND FEDERAL SENTENCING POLICY

THURSDAY, JUNE 29, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. Bill McCollum (chairman of the subcommittee) presiding.

Present: Representatives Bill McCollum, Steven Schiff, Fred Heineman, Ed Bryant of Tennessee, Steve Chabot, Robert C. Scott, Melvin L. Watt, and Sheila Jackson Lee.

Also present: Representatives John Conyers, Jr., and Charles B. Rangel.

Staff present: Paul J. McNulty, chief counsel; Glenn R. Schmitt, counsel; Dan Bryant, assistant counsel; Aerin D. Dunkle, research assistant; and Martina Hone, minority counsel.

OPENING STATEMENT OF CHAIRMAN McCOLLUM

Mr. MCCOLLUM. I am going to call the Subcommittee on Crime to order this morning and welcome you.

We have had a rather late night session, so I don't know how many of my colleagues will be here in a prompt fashion this morning. I saw one a moment ago. To the degree that we don't have wider participation at the moment, I apologize, but we have been in session and just got out. We will be out for quite a while and should be able to conduct a relatively uninterrupted hearing for several hours this morning, so that is good.

Mr. WATT. Mr. Chairman, may I be recognized?

Mr. MCCOLLUM. Certainly you may be recognized.

Mr. Watt.

Mr. WATT. Mr. Chairman, some of us have not been home since yesterday. We are still wearing the same clothes that we had on yesterday.

Mr. MCCOLLUM. If you would yield, I happen to be in one of those same positions.

Mr. WATT. Then you hopefully will empathize and understand what I am about to say and the sentiments I am about to express.

I think we would be doing this subject a disservice and ourselves a disservice to proceed with this hearing on this important issue under the circumstances. Either we are going to have to hold our arms down tight or open the windows or go home. At a minimum, I would hope that we would consider delaying this hearing for long

enough for those of us who need to go home and change clothes and take a shower to be able to do that.

Mr. MCCOLLUM. Mr. Watt, if you would yield back to me, I would express the sentiment that I would like to be able to do the same as you, but we have already started this hearing half an hour late. We have a number of witnesses who have come some distance for this purpose; it is not just a question of having somebody from downtown today. We have to balance the consideration of all petitions involved.

We will be as generous as we can with the time. We will be here for several panels today, not just one, but I believe that Members are going to have to find ways to accommodate the schedule today since we have a full schedule and seven of the nine witnesses are from out of town. I suspect those out-of-town witnesses may have plane schedules later. We will be giving it our best today.

We have three members of the subcommittee here besides the chairman, and I have had several say they want to be here. I am sure they will be here in a few minutes. The chairman may at some point, if he finds an appropriate representative, take a break during the process. I believe that we need to proceed, plus we are under some time constraints because the Sentencing Commission has given us its decision, and if we do not take any action their decision will become effective.

I think we must, in light of our hearing schedule in July, proceed with this hearing today.

Mr. WATT. Perhaps I could suggest that we open the windows and let in some fresh air.

Mr. MCCOLLUM. We will have to live with each other. We are probably far enough removed from the audience. I would like to continue with the statement, and understanding the Members' concern about it.

This morning we examine the issue of Federal sentencing policies for cocaine-related offenses. To be more specific, we will consider whether Congress should agree with proposals from the Federal Sentencing Commission to dramatically reduce penalties for the distribution and possession of crack cocaine in order to conform them with penalties associated with powder cocaine.

As today's hearing will no doubt reveal, few subjects evoke stronger opinions than this one. I am anticipating a very thorough and productive discussion of this important question.

Regardless of our differing views on this matter, I think there are two points about which we can all agree. First, the emergence of crack cocaine in America's cities in the 1980's has had a devastating impact.

Last week we heard dramatic testimony from the police chief, prosecutor, and Chief Judge in the District of Columbia about what crack cocaine has meant to the Nation's Capital. They warned us in unmistakable terms not to reduce crack penalties to those of powder offenses because of the extremely destructive nature of the crack market. We cannot fail to take note of the severe harm caused by this terrible drug.

The second point on which we can all agree is that the current distinction between crack and powder cocaine offenses is not perfect. When Congress established these penalties in 1986 and 1988,

we attempted to set punishments that fit the crimes and that sent the unmistakable message that drug trafficking will simply not be tolerated. Such actions are always subject to occasional review, as we are doing here today.

I, for one, am certainly willing to consider alternative proposals, but I am unwilling to send a message to crack dealers that Congress is softening its stance regarding the acceptability of their behavior.

Also, let me raise a chief concern which I will focus on in this hearing. My concern relates to the basic authority of the Sentencing Commission and the proposed changes to the guidelines it recently approved in this area.

I was actively involved in the formation of the Comprehensive Crime Control Act of 1984 in which we established the Commission and directed it to develop sentencing guidelines consistent with Federal criminal laws. In other words, we charged the Commission with the task of eliminating penalties for crimes that stand in sharp contrast with statutory minimum penalties.

Since Congress has said, and it is now Federal law, that the sale of 50 grams of crack should be punished with not less than 10 years in prison, the Commission is responsible for setting guidelines for crimes involving less than 50 grams that "conform" to this standard.

The Commission's proposal before us today would result in a case involving, say, 49 grams, in a sentence far below the 50 grams level. I have serious doubts that this action is consistent with the Commission's statutory authority. That does not mean that we might not need to revise the statutory authority, but I have questions as to whether it is consistent. I look forward to hearing from members of the Commission on this issue.

Finally, I will shortly be introducing legislation along with our colleague, Bart Stupak, which responds to the Commission's proposals. Mr. Stupak has submitted a statement that, without objection, will be made part of the record of this hearing.

[The prepared statement of Mr. Stupak follows:]

PREPARED STATEMENT OF HON. BART STUPAK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, as a former law enforcement officer, I urge this subcommittee to support legislation to prevent the United States Sentencing Commission from drastically reducing the punishment for trafficking in crack cocaine and money laundering.

On May 1, 1995, the Sentencing Commission submitted proposed changes in the federal sentencing guidelines pertaining to crack cocaine and money laundering. Despite evidence that crack cocaine does even greater harm than powder cocaine to vulnerable communities and low income neighborhoods, the Sentencing Commission proposes making the mandatory minimum penalties currently provided for by statute for crack cocaine equal to those for powder cocaine. Specifically, the Sentencing Commission recommends equalizing the minimum penalty for crack cocaine and cocaine powder by dropping the minimum penalty for conviction of trafficking in crack from 10 years to 21–27 months.

I, along with Congressman Bill McCollum, will be sponsoring legislation to prevent the Sentencing Commission from lowering the minimum sentence for trafficking in crack cocaine. Without Congressional action, the Sentencing Commission's recommendations will become law by November 1, 1995. I strongly oppose these recommendations, and that is why I, along with Congressman McCollum, will draft and introduce legislation.

If Congress adopts the Sentencing Commission's recommendation to treat crack and powder cocaine alike in regard to mandatory minimum penalties for drug trafficking convictions, some offenses now subject to a 5- to 10-year mandatory minimum prison term will potentially result in a sentence involving no required prison term at all.

I am a strong supporter of crime fighting efforts, especially in regard to putting drug dealers behind bars. We have a responsibility to protect the most economically-disadvantaged and other threatened communities from narcotics predators. Crack has only been around for a decade, but this cheap, potent and highly addictive drug has destroyed countless individuals, families, neighborhoods and communities.

The epidemic has also drained public coffers and overwhelmed public safety, public health and child welfare resources. Since 1980, the United States has spent more than $100 billion in the war on drugs. The crime and gang violence that accompanies crack addiction remains at epidemic levels. In fact, the devastating effect caused by crack touches all Americans in some way.

I believe the Sentencing Commission has ignored some hard facts about crack cocaine. Crack is a more dangerous and harmful substance than powder cocaine for several reasons: crack is more psychologically addictive than powder, because smoking crack produces quicker, more intense and shorter-lasting effects than snorting cocaine powder; crack can be broken down and packaged into smaller, more affordable packages for distribution to the most vulnerable members of society; crack houses contribute heavily to the deterioration of neighborhoods and communities; and the present crack market is associated with violent crime to a greater extent than cocaine powder.

I am aware that current sentencing guidelines have been criticized for providing the same penalty for larger amounts of powder cocaine than for crack cocaine. While an adjustment to the current penalty structure may be appropriate, I believe that any such adjustment should be made by increasing the penalties for trafficking convictions for powder cocaine, rather than reducing the penalties associated with crack cocaine.

I also oppose the Sentencing Commission's decision to reduce minimum sentences in money laundering cases. The guideline recommendations are sweeping in nature and would substantially lower the penalties for many serious money laundering offenses, even though Congress has determined money laundering to be a significant offense subject to a 10- or 20-year maximum penalty. This proposal sends a dangerous message that money laundering associated with drug trafficking and other serious crimes is not viewed as the grave offense it once was. In fact, the penalties for money laundering are an important tool in combatting narcotics violations, because drug dealers use money laundering to effectuate their illegal drug trade.

We must realize that today's drug problems are of epidemic proportions, and we must act to combat this plague facing our society. I urge this subcommittee to continue the fight against drugs by supporting legislation to prevent the Sentencing Commission from adopting its proposed changes to sentencing guidelines by reducing the mandatory minimum penalty for crack cocaine and money laundering.

Mr. MCCOLLUM. I look forward to the testimony of all of our witnesses today.

I would like to ask if there are any other opening statements. Does the gentleman from Virginia have an opening statement?

Mr. SCOTT. It is with pleasure and interest that I am here to participate in the hearing on cocaine and Federal sentencing policies.

I am particularly grateful for these hearings because it gives us an opportunity to confirm suspicions some of us have had that the current 100-to-1 disparity in sentencing for crack and powder cocaine offenders is a gross injustice that has significant racial overtones.

Under the direction of the 1994 crime bill, the U.S. Sentencing Commission studied the sentencing disparity, published its findings, and, as I understand it, unanimously concluded that the 100-to-1 disparity was too great and that a majority in fact voted for a ratio.

Another area for us to explore, Mr. Chairman, is the use—instead of just looking at the sentences, crack and powder, is to use the enhancements. The associations that were referred to at our

last hearings can be accommodated with enhancements when there is a firearm. When there is violence and whatnot, the sentence can be enhanced. So it is important to concern ourselves with what the appropriate solution would be.

We also have a situation that I think we ought to consider, and that is the effect of sentencing generally, because we have also had testimony of the effect of drug courts where incarceration isn't used at all, rehabilitation is used, and that has worked out extremely well in many areas.

Mr. Chairman, we need to explore the racial disparity that clearly exists as a result of the mandatory minimum sentence. You just indicated the disparity between, I think, 50 and 49 grams' worth of crack. You could have 5,000 or 4,999 grams of powder and get the same sentence. The disparity in terms of money is that you get the same sentence for about 750 dollars' worth of crack. You could sell thousands of dollars' worth of powder cocaine and still not be subject to the same punishment.

It is also a fact that crack dealership is kind of relatively low in the distribution network, that crack comes from powder that is distributed higher up, and it seems to me inappropriate to punish the relatively low-level distributors and the higher levels get much lower sentences.

The racial implications, Mr. Chairman, are fairly clear, and I am sure we will hear something along those lines. So I look forward to the testimony. It will give us an opportunity to come to a fair and just resolve of equalizing sentences and find out the exact approach we ought to pursue.

Thank you.

Mr. MCCOLLUM. Mr. Schiff.

Mr. SCHIFF. I will be brief. Because of a conflict in schedule, I will have to leave in a little bit, not immediately, but I do have a staff member who will be here to brief me on the remainder of the testimony.

I have three things that I would like to say very briefly. The first is, I spent a career in criminal law, mostly as a prosecutor but 2 years as a defense attorney, before being elected to Congress. During that time, particularly as a prosecutor, I would hear complaints of defendants and their families that they weren't being treated fairly, that if someone else had done what they did, they would be treated less harshly. It was a litany.

I want to say on that, that we have an obligation, those of us who create the laws, always to look at the fairness of the laws and look at the fairness of enforcement. It is part of our obligation as a due process country.

Having said that, I would like to make my second point, which is, there is an undefeatable way for people to avoid being in a situation where they think they are being treated unfairly; don't commit a crime. Nobody is ever forced to commit a crime. Nobody has to possess powder cocaine. Nobody has to possess crack cocaine, much less sell those items.

If individuals make the deliberate choice to violate the law, given the fact that human justice is never perfect, they are in a system where, in fact, there could be some unfairness in matters of prosecutorial discretion—amount of evidence, number of codefendants,

and a whole bunch of factors beyond the specific law we are talking about here.

I want to say very strongly that people can avoid being in that situation by just deciding to abide by the law. If they decide not to abide by the law, I am not in overwhelming sympathy for the plight they find themselves in by their own decision.

No. 3, Mr. Chairman, we have studied this issue before, and I appreciate your having this hearing. I think it is an important issue. But I want to say that I am not sure from the disparity issue what is on the minds of those who say it is on their minds.

I say that because when there is a disparity, as there is admittedly between crack cocaine and powder cocaine, in the law, there are two ways to solve the disparity problem. The way that is proposed before us I do believe, from the Sentencing Guideline Commission, is to lower the current penalties for crack cocaine to be equal to what the penalties for powder cocaine are today.

There is another way to solve the disparity. You can raise the penalties for powder cocaine to match the penalties for crack cocaine. Either approach absolutely ends the disparity, and if disparity is the issue, then both of those proposals ought to be on the table.

Thank you, Mr. Chairman.

Mr. MCCOLLUM. Thank you, Mr. Schiff.

Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

On the theory that you can hear my views on this issue at any point, I will not make any comments. I will say to the panelists that in addition to needing a bath and a shave, the Supreme Court is likely to be handing down this morning a decision in the redistricting case that might affect my ability to be on either this subcommittee or on the full committee or any other committee in this Congress. So if at some point I run out in horror, you will know that I have disappeared for a good reason.

I will stay as long as I can, try to be as inoffensive as I can in my appearance and odor, and if I have to leave I will try to leave without expressing much emotion about it.

Thank you, Mr. Chairman.

Thank you, Mr. Watt.

Mr. Heineman.

Mr. HEINEMAN. Thank you, Mr. Chairman.

In light of what Mr. Watt had to say, I come from the same State and will be subject to the same redistricting, but I certainly hope they don't redistrict Mr. Watt out of the State. I think he has been a plus to not only this committee but the Banking Committee.

And I expect you will be around a lot longer than I will, Mr. Watt.

On that, I yield back to the chairman.

Mr. SCOTT. I would like unanimous consent to enter into the record a statement from Representative Rangel of New York.

Mr. MCCOLLUM. Without objection.

[The prepared statement of Mr. Rangel follows:]

PREPARED STATEMENT OF HON. CHARLES B. RANGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, good morning. I would like to thank Chairman McCollum and Representative Schumer for allowing me to participate in this important hearing to evaluate cocaine sentencing guidelines, specifically as they are applied in crack cocaine cases. As a former member of the Judiciary Committee and as former Chairman of the House Select Committee on Narcotics, I can assure you that the issue of narcotics abuse and control is a crisis that threatens our national security, our standards of justice, and the very humanity of our great democracy.

I look forward to hearing the testimony of the witnesses this morning. I am a strong supporter of the U.S. Sentencing Commission's report that calls for the elimination of the 100–1 disparity involving crack versus powder cocaine. This report enhances my own proposed legislation, H.R. 1262, The Crack Cocaine Fair Sentencing Act of 1995 by addressing the legitimate and real concern of violence related to drug trafficking. In addition, I look forward to hearing the clear testimony of the Justice Department, which has criticized both the 100–1 ratio and the U.S. Sentencing Commission report. Finally, I welcome the testimony of those, including Wade Henderson of the National Association for the Advancement of Colored People, federal Judge Lyle Strom, and others, who can speak to the impact of this sentencing disparity on affected communities.

As you know, I have been a strong proponent of stiff penalties for those who prey upon some of the poorest people on Earth by harvesting, trafficking, and dealing drugs. As a former federal prosecutor, I have nothing but scorn for those who destroy whole communities by spreading drugs. Indeed, my community, perhaps more than any other, has been devastated by the effects of crack dealing in the last fifteen years.

With my House colleagues, I have traveled throughout this country and throughout the world to examine the extent of this scourge. From our experiences, we have come to some strong, but incontrovertible realizations. First, drugs have the capacity to incapacitate entire organizations, communities, and countries. Second, as a society and values our community and values or democracy and freedom, we must develop and promote the belief that drug use is unacceptable while reclaiming those who have failed in their personal battle with drugs. Finally, the fight to stop the spread of narcotics demands that these efforts be based in the ideals of democracy and justice.

However, this 100–1 sentencing disparity in crack versus powder cocaine undermines our sense of justice by punishing low-level retail peddlers and users more severely than the high-level narcotics suppliers and traffickers. Furthermore, this disparity further marginalizes the minority communities where it has been disproportionately applied. How can it be that the African American community, which represents less than 15% of the overall population, make up almost 90% of the federal defendants? Such a disparity, even if unintended, has the effect of undermining our democracy and our beliefs in fairness and decency, as outlined in the Constitution. Turning our backs and ignoring this disparity, as Attorney General Reno's proposed legislation would do, hurts more than the defendants. It further entrenches a flawed set of mandatory minimums that has reduced many of our finest jurists into mere clerks who blindly apply the prescribed sentence, regardless of the circumstances.

Again, I thank you for holding this important hearing, Mr. Chairman. I am confident that this Committee, can lead an effort to address this issue in a fair and non-partisan manner. I urge this Committee to embrace the U.S. Sentencing Commission's report, adopt the 1–1 ratio and include the enhancements regarding weapons and violence. This report represents the honest effort to deal sternly and fairly with crack offenses.

Mr. MCCOLLUM. At this time I would like to call our first panel of witnesses. I will introduce you in the order in which the names are seated here with no particular intent to do otherwise.

Our first witness, to my left, is Judge Deanell Tacha, Commissioner of the U.S. Sentencing Commission and U.S. circuit judge for the tenth circuit.

Appointed to the Federal Appellate Court by President Reagan in 1985, Judge Tacha recently completed a 4-year term as Chair of the Judicial Conference Committee of the Judicial Branch. In addition to her distinguished career on the bench, Judge Tacha has served on the faculty of the University of Kansas as vice chancellor

for academic affairs, associate dean of the university's law school, and professor of law. Welcome, Judge.

Our second witness and the next one I would like to welcome is Judge Richard Conaboy, Chairman of the U.S. Sentencing Commission, a U.S. district judge for the Middle District of Pennsylvania. Judge Conaboy chaired the Pennsylvania Commission on Sentencing from 1977 to 1980 and was appointed district judge by President Carter in 1979. He became Chief Judge in 1989 and took senior status in 1992.

In addition, Judge Conaboy has served as chairman of the Pennsylvania Joint Council on Criminal Justice, chairman of the Pennsylvania Conference of State Trial Judges, and vice chairman of the Pennsylvania Governors Justice Commission.

Our third and final witness on this panel is Wayne Budd, Commissioner of the U.S. Sentencing Commission. Commissioner Budd is also a practicing attorney with the law firm of Goodwin, Proctor & Hoar in Boston, MA.

In 1989, Mr. Budd was appointed U.S. attorney for the District of Massachusetts by George Bush and subsequently appointed as Associate Attorney General of the United States in 1992. Mr. Budd has also served as chairman of the Joint Bar Committee on Judicial Appointments for the Commonwealth of Massachusetts, president of the Massachusetts Bar Association, and a member of the Commonwealth of Massachusetts Commission on Judiciary. I would like to ask Mr. Budd to please join us.

I would request that Judge Conaboy proceed first. You have the lead on this, and then perhaps Judge Tacha and Commissioner Budd.

STATEMENT OF HON. RICHARD P. CONABOY, U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, AND CHAIRMAN, U.S. SENTENCING COMMISSION

Judge CONABOY. Thank you Mr. Chairman. Thank you for the kind introductions. We didn't expect to be so kindly introduced here, and we appreciate that, and we are happy, Chairman McCollum and members of the committee, to be here. It is an honor for me to be representing the U.S. Commission as Chairman. As you indicated, two other members of our Commission, Judge Tacha and Commissioner Budd, were kind enough to join me here today.

Initially, Mr. Chairman, if I might, just let me respond briefly—and I don't mean this by way of argument or anything of that nature—to two of the concerns that you mentioned in your opening remarks.

You mentioned dramatic reduction in sentences, and indeed some of the recommendations that we make perhaps would mean less severe sentences than are presently imposed, but let me assure you that the sentences under the Sentencing Guidelines in the United States today are very, very severe, perhaps the most severe of any nation in the world.

The second thing that you mentioned, which we consider often, is the question of the authority or the jurisdiction of the Commission. I want to assure you—and I am sure that I speak on behalf of the other Commissioners—that we make no effort to exceed our

authority, and we acknowledge, and we do it here publicly today, that the legislature has the ultimate authority to set penalties.

You will notice, in reviewing the Sentencing Guidelines, it is one of the things we get a great deal of criticism about, that we bottomed or started the sentences in most of the areas of the guidelines on the minimums that were set by the legislature and went from there up. Some commissions have not done that. They chose to set their own penalties. We made a decision some time ago, before my term, to do otherwise.

Even in those cases where at times we look as we have done at the crack statute, it is done pursuant to the authority that Congress has bestowed on us to review and to make recommendations back to the Congress, and we make them respectfully and in that regard. We want you to know that we try to be aware of our jurisdiction at all times.

As you know, Mr. Chairman, the Sentencing Commission was created in 1984 as an independent expert agency to review and change and to rationalize Federal sentencing policy. The issue that we come here to discuss is the type of issue that the Commission was created to address. It is an issue that touches on basic concerns about violence and crime in society and concerns that we feel strong, tough, and intelligent crime control measures must be designed to attack.

But it is also an issue that raises, as someone has said, very difficult questions about race and about fairness. I know Congressman Schiff has mentioned the issue of fairness, and while I agree that there is no need to extend additional sympathy to those who voluntarily commit crime, I think we do have to consider fairness no matter whom we treat. It has often been said that a country can be best judged on the way it treats its criminals and those who don't necessarily live up to those rules that the rest of us set to try to keep peace in society. It is this type of complex, multidimensional issue that requires the expertise that you in Congress were looking for when you created the Commission, and it is why Congress, as a part of the Violent Crime Control Act of 1994, directed this Commission to study and to provide recommendations to you for any changes found necessary regarding the policy on crack cocaine. It was pursuant to your request then that we did study this issue.

Let me assure you as best I can that we have indeed studied this issue from every conceivable angle and for many, many months. After all of the research and all of the long and sometimes painful discussions, the Commission unanimously concluded that the current sentencing scheme for cocaine offenses, particularly that part of it which provides for the 100-to-1 ratio, could no longer be justified. This conclusion and the facts that underlie it are documented in our 200-plus-page exhaustive report which we submitted to Congress in February.

Before I discuss that report and its actions, it is important, members of the committee, I think, to lay out the context that underlies this issue. The dockets in the Federal criminal courts are now dominated by drug crimes, and that is something new in the Federal court system.

As you can see from some of the graphs that we are displaying here, the proportion of drug crimes has increased dramatically over the past 10 years. In 1984 you will note that approximately 50,000 criminal cases were prosecuted in the Federal courts, and about 10,000, or 20 percent of those were drug crimes.

Of those drug cases, over 4,000, or 42 percent, involved cocaine. Crack at the time had not become readily available, and thus few, if any, crack cases were prosecuted federally in those years back around 1984.

By contrast, 10 years later you see, in 1994, 40,000 criminal cases were prosecuted and 17,000 of those were drug crimes. Of those drug crimes, about 8,600, or 52 percent, involved cocaine. Cocaine remains a very high percentage of the drug crimes in Federal courts, but the dramatic change is that in 1994, 41 percent of the cocaine cases involved crack.

Similarly, we ask you to recognize that early on the average sentences served by drug offenders and cocaine offenders, specifically, have very dramatically increased over the past 20 years. Another graph that we have positioned for your view demonstrates that drug offenders now serve about four and a half times longer in prison as offenders for the same crimes than in 1970.

The point of all these charts and the numbers is that drug cases are being prosecuted in large numbers at the Federal level and that drug offenders are being sentenced to very long sentences. When you combine this with the fact that parole has been eliminated, they are not only being sentenced but they are indeed serving those long sentences.

The current Sentencing Guidelines provide for severe and tough sentences for all drug offenses, and this Commission strongly agrees that drug crimes should be prosecuted and that drug offenders should be punished severely.

However, in its extensive review of the cocaine sentencing policy, the Commission was indeed troubled by the current sentencing rules that provide disproportionately severe penalties for those convicted of trafficking in crack cocaine. Those penalties are significantly higher than those for similar trafficking in powder cocaine.

We were equally troubled by the fact that these penalties have a great disproportionate impact on the poor and minorities in our communities across the country. If one sells 5 grams of crack, for example, current law provides for a minimum 5-year sentence. Someone selling cocaine powder, on the other hand, would have to sell 500 grams to receive that same 5-year penalty. It is this quantity difference, what most of us have been referring to as the 100-to-1 quantity ratio, that the Commission finds to be unjustified.

It is true, as some people will point out, that the crack problem as such is more severe in poor, predominantly black neighborhoods and that enhanced enforcement is often meant to help those who live in those areas. But it was our finding that inflicting enhanced punishment on a specific segment of society under this guise is fallacious and misguided.

Mr. Chairman, the Commission's primary conclusion on the issue of Federal cocaine sentencing policy is that the 100-to-1 ratio can no longer be justified and that base sentences for a similar quantity of crack and powder offenses should be equalized.

Let me repeat that because it is important that we know what we are talking about when we refer to base sentences. We conclude that base sentences and not the final sentences should be equalized. These base sentences, which apply to all offenders, are oftentimes enhanced by other provisions in the guidelines before the judge arrives at a final sentence for an individual offender.

Under this revised sentencing system submitted May 1 of this year, base sentences for the kingpin or for the offender who possesses a gun or uses children or who is involved with gangs will be significantly and dramatically raised beyond the offender who does not have those same attributes.

This year, as part of the amendment process, the Commission indeed added several new enhancements that would directly raise penalties for dangerous crack offenders in response to the concern that crack oftentimes is associated with more violence. Together with the already existing enhancements, base sentences then will be raised for a long list of aggravating factors associated with crack and powder offenders, but more so for crack offenders.

Some of these aggravating factors are listed on the chart, and I won't repeat them all, but they talk about enhanced penalties for possession of a gun, for violence, for involvement of juveniles, and many of the items that we are worried about in matters that sometimes occur in the use of crack.

When those aggrevating factors are present, there are enhanced penalties beyond the base penalties that are set in the guidelines, and we feel that this type of policy is the appropriate method of facing and dealing with those additional concerns that surround the crack issue.

Under the amended sentencing policy, including then the base sentences and these additional enhancements, sentences for crack cocaine offenders would probably remain significantly higher than sentences for powder offenders.

The Commissioners who disagreed with the decision on equalizing the base sentences were concerned, as Judge Tacha will talk to you about, that the enhancements might not capture all of the harms associated with crack as are noted in our report. However, I want to reiterate that the differences on the Commission were small and that we were together and unanimous on most of our decisions.

You should be aware, I think, members of the committee, that during our deliberations no one seriously discussed ratios much beyond 5-to-1, and no one or group at any time submitted a proposal or any ratio other than 1-to-1 with a rational explanation as to how it would operate.

The Commission majority then arrived at the policy of equally severe base sentences and significant penalty enhancements for aggravated conduct because of certain facts. The first was that both crack cocaine and powder cocaine are very dangerous drugs.

The Commission found, however, that crack cocaine is sometimes associated with even greater dangers than powder cocaine, and of greatest concern to the Commission was what sometimes has been described as random predatory violence and the use of children that seems to accompany the introduction of crack into various communities. This was the reason and the reasons for many of the

enhancements which we developed to be used when those situations actually existed.

Second, we found that, despite these dangers, that not all persons convicted of trafficking in crack cocaine deserve equally severe punishment. The Congress created the Commission and the guidelines for the explicit reason of providing different sentences for offenders of different culpabilities. Congress embraced proportional sentencing when it wrote the Sentencing Reform Act, and the Commission today strongly believes in it, and because the 100-to-1 ratio predates the Sentencing Guidelines it understandably did not necessarily target the most severe sentences at the most violent offenders.

Now that the guidelines are in place, prison resources and the most severe sentences can be indeed be targeted, not at everyone, but at the most violent offenders, and to do so, we believe, is smart, good public policy.

Our third reason is that virtually all cocaine imported into the United States arrives as powder cocaine. Only in the final stages of distribution at the local level is some of that powder transformed into crack.

This is vitally important, because any sentencing system that provides higher base penalties for crack cocaine will lead to the unfair and unwise result that the more sophisticated, higher-level powder suppliers will be sentenced relatively less severely than some of the retailers they supply, and this is true despite the simple process of transforming powder into crack and despite the fact that the supplier introduced that powder that made the crack possible.

Another point along the same lines is the discussions that we have had with police and others throughout this country that enforces our belief and knowledge that crack is derived only from powder and that those who are most involved in the higher levels are powder dealers.

The fourth reason we looked at is that injecting powder cocaine is as dangerous and sometimes more dangerous than smoking crack. Therefore, even though smoking crack can be more addictive principally because it is cheaper and easier to get and can be used very quickly and therefore is more addictive than snorting powder, the form of the drug, we find, is simply not a reasonable proxy for dangerousness associated with its use, especially in light of the fact it can be so easily produced from powder cocaine.

To put that another way, because powder cocaine can be as dangerous as crack and is so easily transformed into crack, we found it is not good policy to punish crack offenses at disproportionately higher levels relative to powder offenses.

Fifth and finally, because there is such a clear impact of those high penalties on minority defendants, the policy, the 100-to-1 ratio, leads directly to very strong perceptions of unfairness. Crack is cheap, and it is thus distributed and attractive to the poor, many of whom are minorities. With a 100-to-1 ratio we have, we think, unintentionally developed the anomaly of punishing the poor and the minorities more severely under the guise of trying to protect them.

There are many other reasons for our conclusions and recommendations regarding the cocaine sentencing policy which are spelled out in more depth in our report. I ask, Mr. Chairman, that that report be made part of the permanent record of this hearing. I understand that has been done.

Mr. MCCOLLUM. Yes, it has been.

Judge CONABOY. Mr. Chairman, in conclusion—I know everybody is in a rush, and I am trying to reduce these remarks—in concluding, let me speak a bit more personally, if you will.

I am not only the head of the Sentencing Commission in the United States but I am also a father of 12 and, at last count, the grandfather of 46 children. I haven't been home in a few days, so it could be changed. I have been a trial judge for a long time in both the State and Federal courts, over 32 years. During that time, I have seen up close the enormous devastation that drugs have wrought on American society, and my grandchildren, like your children, have to live in this society, and I cannot express to you too strongly how concerned I am for them.

We need to send strong messages about our unwavering intolerance to drug use and drug trafficking. But being strong and tough is not enough, we must be smart, and, most of all, we must be fair. Our country cannot afford literally or figuratively to simply warehouse the thousands of mostly young people who have been brought into or for some reason found their way into the evil and destructive world of drugs.

We must put violent offenders into prison for long periods, no question. But sending 18-year-olds to Federal prison for 20 years for selling a handful of crack while powder suppliers or, for that matter, violent State felons are free in much shorter time is simply bad policy and a waste of precious funds and precious resources. It is also unfair and unjust.

Most importantly, in our deliberation we found that when there is any injustice we must be vigilant in our efforts to remedy it. But when government policy itself is unfair or when government policy is even perceived to be unfair, we feel that our vigilance must be even greater, and I am sure you agree with that.

Long ago Mr. Justice Brandeis compared government to a teacher, and he said that, for good or for ill, government teaches the whole people by its example. We find that if government is seen as unfair or unjust it breeds contempt for the law, and our recent history bears that out.

Mr. Chairman, we agree that crack is a horrible thing. No one can deny that. All drugs are horrible, and, believe me, we punish all drug trafficking very severely in this country. But punishing crack more harshly because it is the drug of the poor neighborhoods much like the cheap wine of those same neighborhoods we believe is wrong.

We at the Commission are committed to working with this Congress to develop policies that we think are strong, smart, and fair, and we believe these recommendations are in that vein, and we hope you will look at them in that light.

Thank you again for giving me the opportunity to be here and to work with you and your staffs.

I want to ask my colleagues to make remarks to you, if they would please. I will first ask Judge Tacha.

[The prepared statement of Judge Conaboy follows:]

PREPARED STATEMENT OF HON. RICHARD P. CONABOY, U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, AND CHAIRMAN, U.S. SENTENCING COMMISSION

Mr. Chairman, members of the subcommittee: it is an honor for me to be here today before your committee representing the United States Sentencing Commission. With me is Commissioner Wayne Budd, a former United States Attorney in the Reagan and Bush administrations and former Associate Attorney General in the Bush Justice Department. Also with me is Judge Deanell Tacha, a member of our Commission, a former law school dean, and a judge on the 10th Circuit Court of Appeals. We very much appreciate the opportunity to address the committee on the Commission's guideline amendments and legislative recommendations concerning cocaine and federal sentencing policy and procedures. There has been considerable confusion and misinformation about the Commission's recent actions, and we are pleased to have the chance to discuss with you what we have done and recommended. We hope to clear up any confusion and also to answer any questions you may have.

As you know, the Sentencing Commission was created in 1984 as an independent and expert agency to review, change, and rationalize federal sentencing policy. The issue that we are here to discuss today is precisely the type of issue that the Commission was created to address. It is an issue that touches on the most basic concerns about crime and violence in our society; concerns that demand strong, tough, and intelligent crime control measures. But it is also an issue that raises very difficult questions about race and about fairness. It is this type of complex, multi-dimensional issue that requires the expertise Congress was looking for when it created the Commission. And it is why Congress, as part of the Violent Crime Control and Law Enforcement Act of 1994, directed the Commission to study cocaine sentencing policy and to provide recommendations for changes in the policy.

Let me assure you that we have studied this issue. We have studied it from every conceivable angle and for many, many, many months. Aver all the research, after all of the long and sometimes painful discussions, the Commission unanimously concluded that the current sentencing scheme for cocaine offenses could no longer be justified. This conclusion, and the facts that underlie it, are documented in the Commission's 200-plus page exhaustive report which we submitted to Congress in February.

Before I discuss the report and the Commission's subsequent actions, it is important to lay out the context that underlies this issue. The federal criminal docket is now dominated by drug crime. As you can see graphically in the chart now being displayed, the proportion of drug crimes has increased dramatically over the past decade. In 1984, 49,842 criminal cases were prosecuted in the federal courts of which 10,094, or 20 percent, were drug crimes. Of those drug cases, 4,278, or 42 percent, involved cocaine. Crack cocaine had not become readily available in 1984 and thus few if any crack cocaine cases were prosecuted federally at that time. By contrast, in 1994, 39,919 criminal cases were prosecuted in the federal courts, of which 16,700 were drug crimes. Of these drug crimes, 8,646 or 52 percent involved cocaine. Forty-one percent of the cocaine cases involved crack cocaine.

Similarly, it must be recognized early on that average sentences served by drug offenders generally, and cocaine offenders specifically, have increased dramatically over the last 20 years. As this next graph demonstrates, drug offenders now serve four and a half times as long in prison as offenders in 1970. The point of all of these charts and numbers is that drug cases are being prosecuted in large numbers at the federal level and that drug offenders are being sentenced to long sentences. The current sentencing guidelines provide for severe and tough sentences for all drug offenses. The Commission strongly agrees that drug crimes should be prosecuted and that drug offenders should be punished severely.

However, in its extensive review of cocaine sentencing policy, the Commission was troubled by the current sentencing rules that provide disproportionately severe penalties for those convicted of trafficking in crack cocaine—penalties that are significantly higher than those for similar trafficking in powder cocaine. We were equally troubled by the fact that these penalties have great disproportionate impact on the poor and minorities in our communities. If one sells 5 grams of crack, for example, the current law provides for a minimum five-year sentence. Someone selling cocaine powder would have to sell 500 grams to receive the same five-year penalty. It is this quantity difference—what most people refer to simply as the 100-to-1 quantity

ratio—that the Commission found to be unjustified. It is true, as some will point out, that the "crack problem" is more severe in poor, predominately black neighborhoods, and that enhanced enforcement is meant to help those who live in such areas. But inflicting enhanced punishment on a specific segment of society under this guise is fallacious and misguided.

I will address the reasons for our conclusions in a moment, I want to take just a minute or so to talk about the members of the Commission. Our members come from different parts of the country and from diverse backgrounds. We have on our Commission former prosecutors, defense attorneys, a law professor, trial judges, an appellate judge who is a former law school dean, and a former counsel to the Senate Judiciary Committee. It is an extraordinary group of hard working and thoughtful people. We have all worked very hard on this issue, and I want to stress first the Commission's unanimity. We all agreed on the conclusions contained in our report to Congress as well as the facts that form the bases of the conclusions. And while we certainly differ on parts of our final specific recommendations, our differences are relatively small.

Mr. Chairman, the Commission's primary conclusion on the issue of federal cocaine sentencing policy is that the 100-to-1 ratio can no longer be justified and that base sentences for similar quantity crack and powder offenders should be equalized. Let me repeat myself on that last point—we concluded that base sentences—not the final sentences—should be equalized. These base sentences, which apply to all offenders violent and non-violent, kingpin and courier, are enhanced by other provisions in the guidelines before arriving at a final sentence for an individual offender. Under the revised sentencing system which we submitted on May 1, for the kingpin or for the offender who possesses a gun or uses children to commit a crime or is involved with gangs or drive-by shootings, the base sentences are raised dramatically. This year, as part of the amendment process, the Commission added several new enhancements that would directly raise penalties for dangerous crack offenders. Together with already existing enhancements, base sentences will be raised for a long list of aggravating factors associated with crack and powder offenders—but more so for crack offenders. Some of these aggravating factors are listed on the chart now being displayed. They include: possession, use, or discharge of a dangerous weapon; possession of a restricted firearm, e.g., machine gun; murder of a victim in the course of a drug crime; death or serious bodily injury resulting from the use of the drug; drive-by shootings; involvement of juveniles or street gangs; sale of drugs to juveniles or pregnant women; drug crime in a protected location; significant prior criminal records; continuing criminal enterprise; and many others. Under the amended sentencing policy, including base sentences and enhancements, sentences for crack cocaine offenders would probably remain significantly higher than sentences for powder offenders. The Commissioners who disagreed with the decision on equalizing base sentences were concerned that the enhancements might not capture all of the harms associated with crack as noted in our report. However, to reiterate that the differences on the Commission were small, you should be aware that the Commissioners who dissented from our recommendation did not seriously discuss any ratio greater than 5-to-1.

The Commission majority arrived at the policy of equally severe base sentences joined with significant penalty enhancements for aggravating conduct because of certain undeniable facts. First, both crack cocaine and powder cocaine are very dangerous drugs. The Commission found, however that crack cocaine is associated with even greater dangers than powder cocaine. Of greatest concern to the Commission was the random, predatory violence, as well as the use of children in drug trafficking, that seems to accompany the introduction of crack cocaine into a community. Second, despite these dangers, not all persons convicted of trafficking crack cocaine deserve equally severe punishment. The Congress created the Commission and the sentencing guidelines for the explicit reason of providing different sentences for offenders of different culpabilities. A woman who allows her home to be used by a crack dealer to store a small amount of drugs is not as culpable and should not be imprisoned as long as the gang dealer who stalks and terrorizes a neighborhood or who gets kids involved in drugs. Congress embraced proportional sentencing when it wrote the Sentencing Reform Act and the Commission today strongly believes in it. Because the 100-to-1 quantity ratio predates the sentencing guidelines, it understandably does not target the most severe sentences and our valuable and scarce prison resources toward those violent offenders. Now that the guidelines are in place prison resources and the most severe sentences can be targeted at the violent offenders. To do so, we believe, is good, smart public policy.

Third, virtually all cocaine imported into the United States arrives as powder cocaine. Only in the final stages of distribution, at the local level, is some of that powder transformed into crack. This is vitally important because any sentencing system

that provides higher base penalties for crack cocaine will lead to the unfair and unwise result that more sophisticated, higher-level powder suppliers will be sentenced relatively less severely than some of the retailers they supply. For example, under the current 100-to-1 quantity ratio, a drug dealer who sells 100 grams of powder cocaine in 10 gram amounts to a series of small time crack dealers would likely be sentenced to significantly less time in prison than any one of those street dealers. This is true despite the simple process of transforming the powder into crack and despite the fact that the supplier introduced the powder that made the crack possible. In setting national drug policy, Congress has repeatedly underscored the unique federal responsibility of disrupting major trafficking operations. The need for federal enforcement focus on major operations was reiterated recently in congressional testimony by William Bennett, the former Bush Administration drug policy director. The current drug czar, Dr. Lee Brown, in a letter to the Commission also stated that the federal enforcement priority today remains on large scale drug operations. Use of the 100-to-1 quantity ratio turns this long-held federal drug enforcement focus on its head.

One other point in this vein. Recently, several Commissioners visited with a special drug task force in the Atlanta Police Department. These are the officers that are on the front lines and directly see the effects of crack cocaine. To a man, all of the officers said that they thought the focus needed to be on the powder suppliers. They believe that getting the powder cocaine dealers off the street will do more to reduce crack trafficking than targeting crack dealers with such hefty penalties.

Fourth, injecting powder cocaine is as dangerous or more dangerous than smoking crack. Therefore, even though smoking crack can be more addictive than snorting powder, the form of the drug is simply not a reasonable proxy for dangerousness associated with use especially in light of the fact that crack cocaine can be so easily produced from powder cocaine. Put another way, because powder cocaine can be as dangerous as crack and is so easily transformed into crack, it is not good policy to punish crack offenses at disproportionately high levels relative to powder offenses.

Fifth, because there is such a clear impact of these high penalties on minority defendants, the policy—the 100-to-1 quantity ratio—leads directly to a very very strong perception of unfairness. Crack is cheap and thus distributed and attractive to the poor—many of whom are minorities. With the 100-to-1 ratio, we have unintentionally developed the anomaly of punishing the poor and minorities more severely under the guise of trying to protect them.

There are many other reasons for our conclusions and recommendations regarding cocaine sentencing policy which are spelled out in depth in our report to Congress. I would ask that the report be made a part of the permanent record of this hearing.

Mr. Chairman, in concluding, I must speak somewhat more personally. I am not only the head of the United States Sentencing Commission, I am also a father of 12 and a grandfather of 46. I have been a trial judge in the state and federal courts for more than 30 years. During that time, I have seen up close the enormous devastation that drugs have wrought on American society. My grandchildren, like your children, have to live in this society and I cannot express to you how much I am concerned for them. We need to send a strong message about our unwavering intolerance to drug use and drug trafficking. But being strong and tough is not enough. We must be smart and we must be fair. Our country cannot afford, literally and figuratively, to simply warehouse the thousands of mostly young people who have been brought or found their way into the evil and destructive world of drugs. We must put the violent offenders in prison for long periods of time. No question. But sending an 18-year-old to federal prison for twenty years for selling a handful of crack while his powder supplier, or for that matter a violent state felon, is free in a much shorter time is simply bad policy and a waste of our precious resources. It is also unfair and unjust.

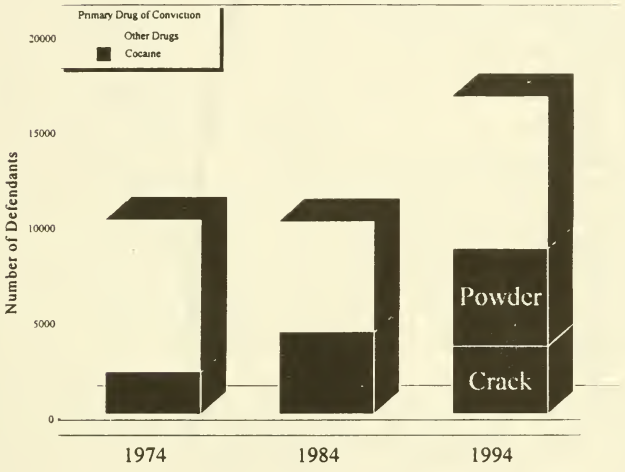
When there is any injustice, we must be vigilant in our efforts to remedy it. But when government policy is unfair, or even when government policy is perceived to be unfair, our vigilance must be even greater. Long ago, Mr. Justice Brandeis compared our government to a teacher. "For good or for ill," he said, the government "teaches the whole people by its example." If the government is seen as unfair or unjust, it breeds contempt for the law. Our recent history bears this out.

Mr. Chairman, crack is a horrible thing. All drugs are horrible. We punish all drug trafficking severely. But punishing crack more harshly because it is the drug of the poor neighborhoods—like the cheap wine of those same neighborhoods—we believe is wrong. We at the Commission are committed to policies we think are strong, smart, and fair. We believe our recommendations are in that vein.

I thank you again for giving me the opportunity to be here. I would be happy to respond to any questions that the committee might have.

Chart I

Number of Federal Defendants Convicted of Trafficking Cocaine and Other Drugs



SOURCES: 1974 and 1984 FJC Integrated Data Base; 1994 U.S. Sentencing Commission, 1994 Datafile, MONFY94

Chart II

Average Sentences Imposed For Cocaine Trafficking 1971 - 1994

SOURCE: 1971-1986, FJC Integrated Data Base; 1992-1994, U.S. Sentencing Commission, 1992 - 1994 Datafiles, MONEY92, MONEY93, and MONEY94

Aggravating Factors That Lengthen Drug Sentences Under the Guidelines

Possession, use, or discharge of a dangerous weapon.
Possession of a restricted firearm, e.g. machine gun.
Murder of a victim in the course of a drug crime.
Death or serious bodily injury resulting from the use of the drug.
Drive-by shootings.
Involvement of juveniles or street gangs.
Sale of drugs to juveniles or pregnant women.
Drug crime in a protected location.
Significant prior criminal records.
Continuing criminal enterprise.

Mr. MCCOLLUM. Thank you very much, Judge Conaboy.
Judge Tacha.

STATEMENT OF HON. DEANELL REECE TACHA, U.S. CIRCUIT JUDGE FOR THE TENTH CIRCUIT, AND COMMISSIONER, U.S. SENTENCING COMMISSION

Judge TACHA. Thank you, Mr. Chairman, and thank you, Chairman Conaboy and members of the committee, for this opportunity.

First I want to reiterate what Judge Conaboy has said. This has been a difficult issue for the Commission and a great deal of time has been spent both under the able leadership of Judge Conaboy and our wonderful staff. So I hope the committee recognizes that this is the result of a great deal of deliberation and, I must say, agonizing soul searching over this issue.

I also would like to reiterate what the judge said: the differences on the Commission are very small. Let me begin by saying that the report was unanimous that the Commission could find no policy basis for the 100-to-1 differential. Some of the unfairness to which Judge Conaboy referred is contained in that 100-to-1 differential. Further, I emphasize that we are unanimous that the 1-to-1 ratio should apply to users and possessors.

So we are talking here only about distributors and dealers in crack cocaine. The 1-to-1 is for those—and we agree unanimously—who use or possess. The difference between the minority on the Commission—three Commissioners dissented and I wrote the lead dissent—the difference is limited to this question of whether there should be any differential for those who deal and distribute crack, and, secondly, as Judge Conaboy very ably pointed out, whether the aggravating factors that would be added to the base offense level are sufficient to take into account the harms that unanimously the Commission agreed inhere, in crack, in its crack smokable form making it different from powder which is normally injected form.

The Commission was unanimous in the view that crack is more harmful than powder. Indeed, everyone agrees that it is, from previous experts in this body to every circuit court in the Nation, drug users themselves, through anecdotal and sentencing evidence, and certainly our special report.

Why is that so? Why is crack more harmful than powder? One is the reason that Judge Conaboy has mentioned. Crack is normally smoked. It is in a smokable form. Thus, it is that smokable form that is so addictive. It is not physiologically addictive but psychologically addictive.

In the process, we learned so much about cocaine. One of the things that you learn is that the high is very quick and lasts a very short period of time when one smokes crack cocaine. When one does so, the psychological need for a new dose of crack cocaine will occur somewhere around a half an hour later. Thus, the possibility and vulnerability to binging is much greater when one smokes a drug than when one injects it. Thus, that is one of the harms.

Another harm is that, because of its ease of use, the smokable form, most people are not as willing to inject into their arms or into their bloodstream as readily or on as broad a basis as those who are willing to smoke.

Finally, I have a lot of anecdotal evidence about defendants who had used both powder and crack. Powder: Sometimes over a period of time, of course, it affected their lives, but their testimony was that when they went to crack cocaine and switched to crack in its smokable form, their lives were devastated and many of those of the defendants whom they new.

Another increased harm with crack is the market itself. Crack is normally sealed in single dose portions; that is, in the vernacular, "rocks", one-tenth to half a gram. These are available for as little as $5, and I will remind you that in 1986 one of the experts who testified before this committee said it is sort of like the McDonald's situation. Crack in that $5 cheap form is like fast foods. It is in a readily packaged, easily available, very affordable form.

Why is that so dangerous? It is because it has made this drug available to a whole new population, our children. Indeed of those who used crack over the last year, it is most popular with children 12 to 17 years old.

I am a mother of four children at or near those ages, and I can tell you that it gives me great concern that we would even consider the possibility of bringing down to a very low level the penalties for those distributors who make available crack for "lunch money."

Why aren't the enhancements enough? We would like to see somehow the guidelines work with enhancements, but the two harms I have just told you about, addictiveness and the market, simply cannot be taken into account by these guideline enhancements.

For me as a judge reviewing these sentences, it seems to me much more straightforward as a baseline threshold level to adopt at least some differential to take into account these market and addictiveness considerations which simply cannot be taken account of in these enhancements.

Let me also remind you, we are talking about distributors and dealers here, we are not talking about users where we all agree that 1-to-1 is appropriate. To me and to the other dissenters, 1-to-1 provides insufficient penalties for these crack dealers.

A crack dealer who sells 50 grams will potentially, without enhancements—and I readily say this is without enhancements—be subject to only 12 to 18 months instead of the current 10-year sentence; that is assuming the mandatory minimum would go away as well. And it is clear that the sentences, according to the majority, will be more severe for crack dealers if the enhancements apply, makes the point about the increased violence that inheres in the crack market.

You will then ask what is the appropriate ratio. If I agree 100-to-1 is too much, and the other dissenters do as well, and we agree that 1-to-1 is correct for users and possessors, I think it would be inappropriate for me as a dissenting member of a commission that must work on a collegial basis to recommend to you any particular alternative ratio. We did not prevail; the majority prevailed. Thus, Judge Conaboy is correct: No other ratios were discussed very much among Commission members.

I therefore offer you only some possibilities with no recommendation. I say 100-to-1 is too high. I say this is not an exact science by any means. The 100-to-1 does have some unfairness perceptions

in it for which we could find no policy basis. There are lots of ranges in between. I would quickly suggest three that I have heard discussed and have seen discussed in the literature.

One, the possibility of a 5-to-1 base offense level. That differential can be justified because heroin and methamphetamine are sentenced in exactly that way, on a 5-to-1 basis to powder cocaine. We could talk about all the pros and cons of that and why those are analogous. Heroin is injected, however, and crack is smoked. As we have just talked about, an injected drug is not as broadly used as a drug that is smoked and certainly not as broadly used among young people. Heroin remains somewhat more expensive as well.

A second alternative might be, and is talked about in the literature, is 10-to-1. That is the one example in the guidelines where a smokable of the same drug is treated in a different way than that same drug. Methamphetamine in its purer form, or ice, is treated 10-to-1 in its smokable form against standard meth at the 1 level.

Finally, there has been discussion of 20-to-1 in the literature. It seems to be justified on rules on the offense, which leads me to the discussion about low-level dealers getting worse sentences than high-level dealers.

The crack cocaine market is a very different market. The cocaine market in powder is what one could, I think, generally call a vertical market, one we think about with importers and high and mid level and low level. The crack cocaine market—this process of changing the same pharmacological substance, cocaine, from the powder form which is injected to the smokable form, is a very simple process, done quite easily. That is absolutely correct.

But the result of that is that the crack market is a horizontal market where dealers at literally the retail level can be utilizing horizontal organizations and engaging in many transactions in those horizontal organizations. So it would be very important even though, in the stereotypical vertical line, it would not be viewed as very high in the chain.

I simply—and I think it is true that the other dissenters—simply could not adopt a sentencing structure that functionally and effectively encourages that simple, very simple, process of changing the powder into crack, but it is that process that makes this drug readily available, in a smokable form, and in a very affordable form, and available to our children and available to devastate our neighborhoods.

Finally, a brief note. We have been instructed by statute and by this Congress to have a race-neutral sentencing scheme. Every circuit court in this Nation is unanimous, the Sentencing Guidelines and this particular provision can point to no racial discrimination or racial animus or intent on the part of Congress or of the Commission in establishing these Sentencing Guidelines. The Sentencing Guidelines are race-neutral.

What that means is that for every defendant who does the same criminal action, the same base offense levels and the same enhancements will be applied, regardless of race. To take any different tack to sentencing based on any different judgment, whether on race or location or prosecutorial activity or whatever other factor, is for me to retreat from a mandate to have a race-neutral sentencing framework.

Let me conclude then by saying that whatever the final ratio is, you need to understand that the mandatory minimums work hand in hand with the guidelines. One hundred-to-one we unanimously agree is too high. We also reaffirm that 1-to-1 for users and possessors is a unanimous recommendation. However, for the dealers and distributors who devastate neighborhoods, who gather children rapidly into the marketing system, we believe the harms cannot be appropriately captured in the enhancements.

Thank you, Mr. Chairman.

[The prepared statement of Judge Tacha follows:]

PREPARED STATEMENT OF HON. DEANELL REECE TACHA, U.S. CIRCUIT JUDGE FOR THE TENTH CIRCUIT, AND COMMISSIONER, U.S. SENTENCING COMMISSION

Mr. Chairman, members of the Committee, thank you for the opportunity to present my views on the Sentencing Commission's proposal to equalize sentences for crack and powder cocaine defendants. Let me start today by expressing my utmost respect and admiration for the work of Chairman Conaboy, Commissioner Budd, the other Commissioners, and the Sentencing Commission staff on this very difficult issue. Let me also acknowledge my agreement with Chairman Conaboy that the similarities between the majority and the dissent on this issue are much greater than our differences. As I stated in my dissent, I wholeheartedly support the Commission's *Special Report to Congress: Cocaine and Federal Sentencing Policy*, including its conclusion that the 100-to-1 quantity ratio that currently drives cocaine trafficking sentencing policy cannot be justified. I also fully endorse the Commission's recommended equalization of sentences for crack and powder cocaine possession offenses. The point at which I must respectfully disagree with the majority, however, is the majority's conclusion that equalization of sentences for cocaine and crack distribution offenses is the solution.

Since its advent in this country, crack cocaine has been associated with greater harms than has powder cocaine. Expert testimony presented to Congress, every circuit court decision to address the issue, drug users themselves, and the Sentencing Commission's *Special Report*—the product of over two years of study—are all in agreement: crack cocaine is a more dangerous substance than cocaine powder. Crack poses a more acute danger chiefly due to its inherent addictiveness and its ready accessibility to large segments of our society.

While pharmacologically the same, crack is a more addictive substance than powder cocaine. Because crack is smoked, it has quicker and more intense physiological and psychotropic effects on the user than does the snorting of powder cocaine. This intense "high" that comes from smoking crack is short-lived, however, thus creating a craving for more and more of the drug. Indeed, the crack user is more vulnerable to hinging and dependency than persons who snort powder cocaine. Moreover, while a user may be able to achieve a similar effect by injecting powder cocaine, these intense effects are more common amongst crack users because only a few are willing to inject cocaine into their arms through a needle.

While clearly supported by the formal data and research, one really need look no further than to drug users themselves to observe the increased addictiveness and potency of crack. Recently, a Judge colleague of mine sent me transcripts of two sentencing hearings involving crack cocaine offenders. In both cases, despite histories of powder cocaine use, the college-educated defendants were productive members of society. All of that changed, however, when the defendants began using crack. As one defendant reiterated to the Judge, he and many of his friends had snorted powder cocaine infrequently over several years without the drug significantly affecting their lives. In contrast, reviewing his own experience as well as the experiences of the numerous individuals the defendant knew who had tried smoking crack, the defendant was aware of only one individual who had not become addicted to crack after smoking the drug and whose life had not been devastated by its use.

Crack cocaine also poses a greater harm to society than does powder cocaine because of the manner in which crack is marketed. Crack is easily manufactured and is sold in smaller quantities and at lower unit prices than powder cocaine. While cocaine powder is traditionally sold by the gram for $65–$100 per gram, crack is typically sold by the dose (1/10–1/2 gram) for as little as $5.00 per dose. The availability of crack has reduced the financial burden that previously limited cocaine usage in this country to the relatively affluent. Most distressingly, the cheap price

of crack has allowed children to afford cocaine, exposing the most vulnerable segment of our society to another potent, addictive drug.

Dr. Robert Byck, M.D., described the crack market as he saw it in 1986:

> [W]hat we have here is the fast food solution. It is not that McDonald's hamburgers are necessarily better, . . . it is the fact that they are already prepared, they are ready to go, and they come in a little package. Here suddenly we have cocaine available in a little package, in unit dosage, available at a price that kids can pay initially.

"Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 99th Cong., 2d Sess. 20 (1986) (Testimony of Dr. Byck). Sadly, Dr. Byck's analysis has proved correct: of those using cocaine in the past year, crack was more popular among *12- to 17-year-olds* than among any other age group. Indeed, as the mother of four children, it concerns me greatly that a substance as addictive as crack is available for little more than "lunch money."

Additional harms associated to a greater degree with crack than with powder cocaine include the increased association of violent crime with crack, the deterioration of neighborhoods due to open-air markets and crack houses, and the high correlation between crack and a host of social harms, including parental neglect, child and domestic abuse, and high risk sexual behaviors. Guideline enhancements, including the proposed enhancements, simply do not account for all of these hands. Thus, higher base sentences for crack distribution offenses are necessary for sentences to reflect the greater dangers posed by crack.

Keep in mind, the penalties we are discussing today relate only to crack distribution offenses. The entire Commission is in agreement that higher base sentences are not warranted for those who use or possess crack. Crack distributors, unlike possessors, are essential links in the distribution chain. Thus, when designing appropriate penalties for crack distributors, the manner in which crack is marketed is of critical importance.

Furthermore, adopting a one-to-one quantity ratio at the powder cocaine penalty level provides for insufficient punishment of crack distributors. A mid-level dealer who distributes fifty grams of crack (an amount that would currently trigger a ten-year sentence) to other mid- or street-level dealers, and pleads guilty, will face a guideline sentence of only twelve to eighteen months imprisonment under the proposed change. A twelve-month sentence seems, to me, too short for a dealer responsible for up to 500 crack transactions.

Despite the majority's reassurances that crack distributors will continue to receive greater sentences than powder defendants, this can happen under a one-to-one quantity ratio only if crack defendants continue, inter alia, to have more extensive criminal histories, use weapons to a greater extent than powder defendants, and accept responsibility to a lesser extent than powder defendants. In my judgment, it is not sound policy to rely on the fortuity of the presence of the above factors to ensure that crack defendants receive sufficiently harsh penalties. Rather, it makes more sense to me to ensure up front that crack distribution defendants receive appropriately harsh penalties, regardless of their criminal histories or the specific characteristics of the crime involved, simply because they are selling a more dangerous substance. The surest method of accomplishing this is to provide for a differential ratio for crack distribution offenses. What that ratio should be, however, is the subject of much debate and few clear-cut answers.

In discussing ratios, I would first like to reiterate that I find the current 100-to-1 ratio unjustified. Although crack is associated with greater harms than powder cocaine, these harms do not warrant a ratio as high as 100-to-1. Currently, sentences for crack offenders are roughly two to six times as great as sentences for powder cocaine offenders distributing equivalent quantities of drugs. *See* Table A1. In my opinion, this disparity is too extreme, and a lower differential ratio can adequately account for the greater dangers associated with crack. Having said this, however, I am not prepared—nor do I think it would be appropriate for me—to advocate a specific solution. I have never recommended a specific alternative to the one-to-one or even the 100-to-1 quantity ratio. As one of three dissenting members of the Commission on an issue where the majority has prevailed and no other ratio was analyzed by the entire Commission, in my judgment it would be inappropriate for me to make any such specific recommendation. I therefore offer only some factors for your consideration.

Selecting a ratio that adequately and fairly provides for appropriate punishment for crack distribution offenses, like all sentencing policy, is not an exact science. Rather, the process involves looking at a number of options, weighing their advantages and disadvantages, evaluating the impact of the various options on sentences, and ultimately making a judgment call on which option proves most acceptable on

a policy basis. In some instances, it may be helpful to view the actual sentence differentials between crack and powder cocaine defendants at various ratios. Thus, I have included some tables to highlight these areas. *See* Tables A2–A4 (showing, for example, that at a ten-to-one ratio, crack sentences would be one and one-half to three times as great as powder sentences). With this in mind, I offer the following brief discussion of the most frequently cited alternatives: five-to-one, ten-to-one, and twenty-to-one.

Many have advocated a five-to-one ratio for crack to powder cocaine, in large part because heroin and methamphetamine offenses are sentenced at a level of five-to-one relative to powder cocaine. Presumably, heroin and methamphetamine offenses are sentenced more severely than powder cocaine because, like crack, they are more potent. Additionally, unlike powder cocaine or crack, heroin is physically as well as psychologically addicting. While the fact that crack poses no risk of physical addiction may weigh in favor of treating crack offenses less harshly than heroin—*e.g.*, at four-to-one or three-to-one—other factors tip the scale in the other direction. For example, heroin must be injected to obtain maximum effect and is generally more expensive than crack. Thus, heroin is not as accessible to children and, indeed, our most current data indicates that neither heroin nor methamphetamine use is as prevalent in this country as the use of crack. Further, sentences for crack offenders may be too low if sentenced at a level of five-to-one. *See* Table B (setting forth the starting points for sentences at various quantity levels).

Guidelines' precedent exists for applying a differential ratio of ten-to-one to the smokable form of a drug. Like crack, which is more dangerous than powder cocaine largely because it is smokable, pure methamphetamine or "Ice" are concentrations of methamphetamine that are more efficiently smoked than standard methamphetamine (which is usually snorted). Under the sentencing guidelines, pure methamphetamine and "Ice" offenses are sentenced at a level of ten-to-one to standard methamphetamine offenses.

Moreover, as discussed above, another factor making crack more of a danger to society than powder cocaine is the fact that crack is usually broken down and sold in single-dose units, thus providing access to a wider range of individuals—particularly children and the economically-disadvantaged. Powder cocaine, on the other hand, is generally sold per gram. Fifty grams of powder cocaine represents fifty potential sales. Fifty grams of crack, on the other hand, can be divided into five hundred doses and therefore can represent five hundred sales—ten times as many sales as an equivalent amount of powder. Thus, to sentence crack and powder cocaine distributors according to the number of potential sales, a ten-to-one quantity ratio would be required.

Finally, applying a ten-to-one ratio may provide for adequate punishment for crack distributors. For example, under a ten-to-one quantity ratio, a mid-level crack dealer who distributes 100 grams of crack and pleads guilty would face a guideline sentence of forty-six to fifty-one months imprisonment, a sentence that strikes me as considerably more appropriate than the eighteen to twenty-four month sentence mandated by a one-to-one quantity ratio. *See* Table C.

An additional option is a twenty-to-one differential ratio. This is the ratio that was originally proposed by Senator Dole in 1986. One argument in favor of twenty-to-one is that this ratio may roughly equalize sentences of equally culpable crack and powder defendants. Sentencing Commission data, while admittedly very limited, tends to show that crack dealers occupying roles similar to their equally culpable powder cocaine counterparts distribute smaller amounts of drugs. For example, a mid-level dealer is defined as one who distributes large quantities to other mid-level dealers or to street-level dealers. A mid-level powder cocaine dealer is sentenced, on average, at a base offense level of 28, representing a quantity of up to 3,500 grams of cocaine. A mid-level crack dealer, on the other hand, is sentenced, on average, at a base offense level of 32, representing a quantity of up to 150 grams of crack—a difference of roughly twenty-to-one. *See* Table D. Further, the application of a twenty-to-one ratio to 1994 defendants makes the distribution of sentences among crack defendants more closely approximate to the distribution of sentences among 1994 powder cocaine defendants. *See* Table B.

The three quantity ratios I have just presented—five-to-one, ten-to-one, and twenty-to-one—are certainly not the only options. I present them because I think they represent an appropriate *range* of alternatives.

At this time, I would like to briefly address a few issues raised by my colleagues Chairman Conaboy and Commissioner Budd. First, I want to respond to the concern that, under the current system, low-level crack dealers receive sentences akin to those received by much higher-level powder dealers. However, the crack market differs from the cocaine powder market, rendering the distinctions between low-level and high-level dealers less meaningful than in the stereotypical drug transaction.

The cocaine distribution chain market is generally viewed as a vertical framework with importers, wholesalers, and retail-level dealers. Under this vertical framework, each level closer to retail sales involves less culpable individuals. The crack market, on the other hand, often involves horizontally-integrated drug distribution chains that utilize separate and distinct organizations. Under a horizontal framework, a single conspiracy at the retail level can be quite extensive, involving a major distributor, a few mid-level dealers, and several street dealers. Due to the nature of the crack market, a retail-level distributer may indeed be a very major player. Thus, defining low level crack dealers as necessarily less culpable than higher-level powder cocaine dealers is problematic.

At the same time, while I agree that sentences for low-level crack dealers and higher-level powder dealers should be more in line, this problem can be ameliorated by substantially lowering the 100-to-1 quantity ratio. I reemphasize, however, that crack is a more dangerous substance than powder cocaine. Indeed, the entire Commission reached this conclusion in our *Special Report*. Therefore, although the process of manufacturing crack is relatively simple, in my opinion it is nevertheless appropriate to punish a crack distributor more harshly for his or her production or sale of a more dangerous product. I cannot support a sentencing scheme that effectively encourages the distributor to take the final, albeit simple, step of converting powder cocaine to crack and make it more readily available in the marketplace. This is the behavior we should be punishing.

The concern over the racial impact of cocaine sentencing policy is important. Nobody can deny the fact that the 100-to-1 quantity ratio has largely affected African American defendants. This factor alone, however, does not justify reshaping crack penalties. Every federal circuit has addressed this issue and the cases are unanimous: neither Congress nor the Commission acted with discriminatory intent in fashioning the crack penalties. To date, only one of hundreds of federal district court cases has held otherwise, and that case was promptly overturned on appeal. See *United States* v. *Clary*, 846 F. Supp. 768 (E.D. Mo.), *rev'd* 34 F.3d 709 (8th Cir. 1994). The Commission's governing statutes require race-neutral sentencing schemes. The current sentencing guidelines are clearly race-neutral: the base offense levels and enhancements are applied in exactly the same way to all defendants regardless of race. To begin reshaping sentencing schemes because they affect racial groups differently is, to me, to cease to administer a race-neutral sentencing policy.

Finally, let me close by strongly advocating that, whatever the final ratio may be, Congress ensures the mandatory minimum statutes and the sentencing guidelines work together. If the mandatory minimum penalties are not revised along with the guidelines, the mandatory minimums will frequently override the guidelines, producing sharp cliffs in sentencing. A coherent sentencing scheme requires consistency between mandatory minimum penalties and the sentencing guidelines.

In conclusion, I cannot support the Sentencing Commission's proposal to equalize sentences for crack and powder cocaine trafficking offenses. At the same time, I appeal to the Committee to reevaluate the current 100-to-1 quantity ratio, and, in doing so, to provide an avenue for consistency between the mandatory minimum penalties and the sentencing guidelines.

Again, thank you Mr. Chairman and members of the Committee, for the opportunity to express my views.

TABLE A1

Differential Sentence Exposure[1] for Drug Quantity
Between Crack Cocaine & Powder Cocaine Defendents
100-to-1 Ratio

QUANTITY	DRUG	OFFENSE LEVEL	SENTENCE[2] (IN MONTHS)	PENALTY[3] RATIO
5 G	Powder Crack	12 26	10-16 63-78	6.30:1
25 G	Powder Crack	14 28	15-21 78-97	5.20:1
50 G	Powder Crack	16 32	21-27 121-151	5.76:1
100 G	Powder Crack	18 32	27-33 121-151	4.48:1
200 G	Powder Crack	20 34	33-41 151-188	4.58:1
500 G	Powder Crack	26 36	63-78 188-235	2.98:1
5 KG	Powder Crack	32 38	121-151 235-293	1.94:1

[1]Sentence exposure is identified using drug quantity alone.

[2]Criminal History Category I only

[3]Penalty Ratio=Crack/Powder, lowest possible within-range sentence used

TABLE A2

Differential Sentence Exposure[1] for Drug Quantity
Between Crack Cocaine & Powder Cocaine Defendents
5-to-1 Ratio

QUANTITY	DRUG	OFFENSE LEVEL	SENTENCE[2] (IN MONTHS)	PENALTY[3] RATIO
5 G	Powder Crack	12 14	10-16 15-21	1.50:1
25 G	Powder Crack	14 18	15-21 27-33	1.80:1
50 G	Powder Crack	16 20	21-27 63-78	1.57:1
100 G	Powder Crack	18 26	27-33 33-41	2.33:1
200 G	Powder Crack	20 26	33-41 63-78	1.91:1
500 G	Powder Crack	26 28	63-78 78-97	1.24:1
5 KG	Powder Crack	32 34	121-151 151-188	1.25:1

[1]Sentence exposure is identified using drug quantity alone.

[2]Criminal History Category I only.

[3]Penalty Ratio=Crack/Powder, lowest possible within-range sentence used.

TABLE A3

Differential Sentence Exposure[1] for Drug Quantity
Between Crack Cocaine & Powder Cocaine Defendents
10-to-1 Ratio

QUANTITY	DRUG	OFFENSE LEVEL	SENTENCE[2] (IN MONTHS)	PENALTY[3] RATIO
5 G	Powder Crack	12 16	10-16 21-27	2.10:1
25 G	Powder Crack	14 20	15-21 33-41	2.20:1
50 G	Powder Crack	16 26	21-27 63-78	3.00:1
100 G	Powder Crack	18 26	27-33 63-78	2.33.1
200 G	Powder Crack	20 28	33-41 78-97	2.36 1
500 G	Powder Crack	26 32	63-78 121-151	1.92 1
5 KG	Powder Crack	32 36	121-151 188-235	1.55:1

[1]Sentence exposure is identified using drug quantity alone.

[2]Criminal History Category I only

[3]Penalty Ratio=Crack/Powder, using lowest possible within-range sentence.

TABLE A4

Differential Sentence Exposure[1] for Drug Quantity
Between Crack Cocaine & Powder Cocaine Defendents
20-to-1 Ratio

QUANTITY	DRUG	OFFENSE LEVEL	SENTENCE[2] (IN MONTHS)	PENALTY[3] RATIO
5 G	Powder Crack	12 18	10-16 27-33	2.70:1
25 G	Powder Crack	14 26	15-21 63-78	4.20:1
50 G	Powder Crack	16 26	21-27 63-78	3.00:1
100 G	Powder Crack	18 28	27-33 78-97	2.89:1
200 G	Powder Crack	20 30	33-41 97-121	2.94:1
500 G	Powder Crack	26 32	63-78 121-151	1.92:1
5 KG	Powder Crack	32 36	121-151 188-235	1.55:1

[1]Sentence exposure is identified using drug quantity alone.

[2]Criminal History Category I only.

[3]Penalty Ratio=Crack/Powder, lowest possible within-range sentence used.

TABLE B

CRACK DEFENDANTS AT EACH GUIDELINE BASE OFFENSE LEVEL
(October 1, 1993 through September 30, 1994)

Base Offense Level	GL Range (CHC I)	Powder		CRACK 100:1		20:1		10:1		5:1		1:1	
		n	%	n	%	n	%	n	%	n	%	n	%
TOTAL		5,146	100.2	2,962	100 0	2,962	100.0	2,962	100 0	2,962	100 0	2,962	100 0
12	10 - 16	174	3 4	54	1 8	225	7 6	311	10 5	438	10 5	939	14 8
14	15 - 21	105	2 0	59	2 0	86	2 9	126	4 3	152	4.3	273	5 1
16	21 - 27	144	2 8	84	2 8	126	4 3	139	4 7	252	4 7	288	8 5
18	27 - 33	184	3.6	77	2 6	139	4.7	265	8.9	280	8 9	320	9 5
20	33 - 41	205	4 0	65	2 2	130	4 4	163	5 5	141	5 5	116	4 8
22	41 - 51	96	1 9	49	1.7	135	4 6	119	4 0	117	4.0	128	4 0
24	51 - 63	130	2 5	49	1 7	74	2 5	88	3 0	120	3 0	118	4 1
26	63 - 78	881	17.1	404	13 6	562	19.0	608	20.5	564	20 5	299	19 0
28	78 - 97	558	10 8	226	7 6	313	10 6	192	6 5	174	6 5	85	5 9
30	97 - 121	318	6 2	144	4.9	96	3 2	171	5 8	88	5.8	90	3 0
32	121 - 151	774	15 0	554	18 7	359	18 7	275	9 3	219	9 3	135	7 4
34	151 - 188	619	12.0	417	14 1	271	9.1	199	6.7	182	6 7	171	6 1
36	188 - 235	373	7 2	275	9 3	170	5 7	135	4 6	235	4 6	—	
38	235 - 293	319	6 2	199	6.7	276	9 3	171	5.8	—	—[1]	—	—[1]
40	292 - 365	182	3 8	135	4 6	Eliminated from drug quantity table in 1994							
42	360 - life	84	1 6	171	5 8								

[1] Because the maximum quantity for crack cocaine in the current quantity table tops is 15KG, no reliable estimates of quantity could be derived

Source: U.S. Sentencing Commission, 1994 Datafile, MONEY94.

TABLE C

DRUG QUANTITY RANGE[1] CORRESPONDING TO EACH BASE OFFENSE LEVEL, AND GUIDELINE RANGE, FOR VARIOUS CRACK : POWDER COCAINE RATIOS

Base Offense	Guideline Range	Powder	Crack 5:1	Crack 10:1	Crack 20:1	Crack 100:1
38	235-293	150+ KG	30+ KG	15+KG	7.5+KG	1.5+KG
36	188-235	50 - 150KG	10 - 30KG	5 - 15KG	2.5 - 7.5KG	500G - 1.5KG
34	151-188	15 - 50KG	3 - 10KG	1.5 - 5KG	750G - 2.5KG	150G - 500G
32	121-151	5 - 15KG	1 - 3KG	500G - 1.5KG	250 - 750G	50 - 150G
30	97-121	3.5 - 5KG	700G - 1KG	350 - 500G	175 - 250G	35 - 50G
28	78-97	2 - 3.5KG	400G - 700G	200 - 350G	100 - 175G	20 - 35G
26	63-78	500G - 2KG	100G - 400G	50 - 200G	25 - 100G	5 - 20G
24	51-63	400 - 500G	80 - 100G	40 - 50G	20 - 25G	4 - 5G
22	41-51	300 - 400G	60 - 80G	30 - 40G	15 - 20G	3 - 4G
20	33-41	200 - 300G	40 - 60G	20 - 30G	10 - 15G	2 - 3G
18	27-33	100 - 200G	20 - 40G	10 - 20G	5 - 10G	1 - 2G
16	21-27	50 - 100G	10 - 20G	5 - 10G	2.5 - 5G	500MG - 1G
14	15-21	25 - 50G	5 - 10G	2.5 - 5G	1.3 - 2.5G	250 - 500MG
12	10-16	25G or less	5G or less	2.5G or less	1.3G or less	250MG or less

[1]Each drug quantity range includes at least the first listed quantity but less than the second listed quantity

Table D

COMPARISON OF DRUG QUANTITY LEVELS FOR MID- AND STREET-LEVEL CRACK AND COCAINE DEALERS*
– FY1992 Drug Sample –

ROLE IN INSTANT OFFENSE	CRACK COCAINE	POWDER COCAINE
Street-Level Dealer	**Base Offense Level = 26**	**Base Offense Level = 22**
Quantity	5 - 20 grams	300 - 400 grams
Mid-Level Dealer	**Base Offense Level = 32**	**Base Offense Level = 28**
Quantity	50 - 150 grams	2,000 - 3,500 grams

* If the defendant was held accountable for more than one drug type in the instant offense, the drug that produced the highest base offense level was the primary drug type used

SOURCE: Stratified Random Sample of 1992 Drug Cases, United States Sentencing Commission, MONEY92.

Mr. McCollum. Thank you, Judge Tacha.
Mr. Budd.

STATEMENT OF HON. WAYNE A. BUDD, COMMISSIONER, U.S. SENTENCING COMMISSION

Mr. Budd. Mr. Chairman and members of the subcommittee, under the strong leadership of our Chairman, Richard Conaboy, the Sentencing Commission is firmly confronting the difficult issue of cocaine sentencing policy. It is an issue that has been picked at by so many because it raises trying questions of fear, crime, race, and fairness, no matter what position one takes on the issue. It is easy for critics to snipe at one aspect of that position or another.

In coming up with its recommendations, the Commission has followed an open and careful approach. We have consulted widely with Members of Congress, the Justice Department, other law enforcement agencies, and a variety of interested groups. We found that almost everybody in a position of political authority is reluctant to take a position on this issue. The reluctance of course is understandable.

Even though almost everyone believes in the carefully crafted words of the Justice Department that an adjustment in the current penalty structure may be appropriate, there is a pervasive fear that if you call for a change that lowers the criminal sentence for anyone, let alone a drug criminal, you will be excoriated for being soft on crime or for sending the wrong message on crime. But every once in a while the proper public policy demands an adjustment and demands the leadership to push for a change, because irrational and unfair sentencing policies also send a message.

More than a decade ago, in the Sentencing Reform Act of 1984, Congress created the Sentencing Commission to eliminate irrational and unfair policies that breed disrespect for the law. Then, in the 1994 crime bill, the Congress specifically directed the Commission to tackle the cocaine issue. Led by our Chairman, Judge Conaboy, the Commission did what it was asked to do, face head on this type of political hot potato and provide the dispassionate, nonpartisan leadership on the basis of hard facts and hard data.

As the chairman here stated today, I was appointed the U.S. attorney for the District of Massachusetts by President Bush in 1989, and subsequently, in 1992, he appointed me the Associate Attorney General of the United States. My first priority and my primary focus as a prosecutor was drug crime. I know firsthand the destruction that drugs bring on a community.

After I was sworn in as the U.S. attorney, I visited with community leaders, with clergy, with social activists from around Massachusetts. They told me about the seemingly endless problems of drugs and violence in their inner-city communities, and they asked for Federal law enforcement resources to combat these problems.

They told me in particular about the devastating effect drugs have on minority communities, and we discussed the devastation that comes with crack cocaine. As a result of my meetings, my own experience, and my commitment to strong law enforcement, we in Massachusetts created a Federal, State, and local drug task force, an unprecedented undertaking at the time.

Since its creation, that task force has brought to justice some of the biggest drug dealers in New England. If you have questions whether or not I believe in harsh sentences for drug criminals, just ask some of those drug dealers. Some of the major traffickers we prosecuted are in prison for life, and, frankly, that is the way it ought to be. It should be very clear that I am all for dealing harshly with major drug traffickers. But just as I am devoted to strong law enforcement, I am also committed to parity, fairness, and consistency in Federal sentencing practices.

This is the guiding philosophy of the Sentencing Guidelines, and it is why I was honored to take a position on the Sentencing Commission late last year. As an attorney who has practiced for many years in the Massachusetts courts as well as in the Federal system, I know that parity isn't always achieved.

I am concerned that many times judges are inclined to give a break to defendants who look more sympathetic or who share with them a similar ethnic, racial, cultural or economic background. That simply has been my experience in some cases. Likewise, there are instances when prosecutorial charging decisions and sentencing recommendations often result in unfair treatment for minorities, perhaps for some of the same reasons.

On the issue of cocaine sentencing policy, while the Commission found no racial—racially motivated intent in the creation of the 100-to-1 ratio, there can be no doubt that the higher penalty for crack offenders falls disproportionately on minority defendants. We have prepared some graphs that illustrate the disparate impact.

Now, as you see on the chart that is being displayed, better than 90 percent, 90 percent of all crack cocaine offenders sentenced in Federal court in 1994 were black, 6 percent were Hispanic and 4 percent were white. These numbers are even more startling when you take into consideration that surveys show that the majority of crack users are white. Now, compare these numbers with the percentage of powder cocaine defendants as demonstrated in the—on the left side of the chart; 30 percent of the powder cocaine defendants were black, 43 percent Hispanic and approximately 26 percent were white.

The depth of the adverse impact becomes that much more evident when you consider that on many, many occasions there is discretion in law enforcement as to whether or not to take cases to the State courts where crack and powder penalties are almost invariably less severe and hardly ever with a quantity ratio, or to the Federal courts where the crack penalties are staggeringly more steep. While Congress has attempted to frame a national policy that would be applied uniformly across the country in all similar drug cases, the Commission's research suggests that uniform application simply is not occurring. The present record shows vast and surprising differences in prosecution practices.

For example, many rural Federal districts, like the Central District of Illinois, have experienced a considerably higher proportion of Federal crack cocaine convictions than largely urban districts like the Chicago-driven Northern District of Illinois. A similar example can be found in the Eastern District of New York, which includes Brooklyn. This district reports a much lower number of Federal crack sentencings than either Northern or Southern West Vir-

ginia, where the population is a fraction of the size of Brooklyn's; this is so even though, according to the New York City Police Department, 46 percent of all drug arrests in recent years were crack cocaine-related.

The adverse impact in disparate prosecution practices, however, doesn't tell the whole story. The Commission's study of cocaine sentencing policy examined the pharmacology of cocaine, the way it is used and marketed, the violence associated with its use and marketing, as well as the enforcement priorities surrounding cocaine. We looked hard for a justification for the 100-to-1 quantity ratio and found, as my colleagues have stated unanimously, that there was no empirical or policy justification for it.

The point of all of this is that the 100-to-1 quantity ratio is simply unfair and unwarranted. The Commission unanimously found this to be the case. The gross unfairness may not have been intended at the time the ratio was created, but it certainly has worked out that way in practice.

That having been said, I must reiterate something Chairman Conaboy stated. The Commission found, and it is firmly stated in our report, that there are certain offense and offender characteristics that apply more often to crack offenders as opposed to powder offenders and—which should result in a punishment differential. But in determining the base sentences to which we will add the enhancements, we must all remember that crack cocaine and powder cocaine are derived from the same drug, and we must remember that without powder cocaine, we would not have crack.

You know how it is prepared, simply cooked with baking soda and water. It doesn't take great skill to prepare it, and the conversion is most often done at the very lowest rungs of the distribution chain. The result is that the people being prosecuted for crack cocaine offenses are most often low-level street dealers who buy powder cocaine and cook the crack themselves.

The policy of punishing these offenders with sentences hugely disproportionate to those for their suppliers runs counter to the usual law enforcement policy of seeking higher penalties for those who organize and lead drug rings and who are typically responsible for bringing larger quantities, greater quantities of illegal substances into our communities.

One of the most troubling aspects of the disproportionately higher penalties for crack cocaine, for me as a former prosecutor, is the preponderance of multiple drugs in drug trafficking organizations, especially those involving crack. I don't believe we ever prosecuted a crack case that didn't have powder somewhere up in the chain of command. Too often the street-level crack dealers receive much harsher penalties than the higher-level distributors who sell powder for conversion into crack.

Also under the current sentencing rules, the fortuity of when and how law enforcement officials catch these polydrug dealers largely determines the final sentence. For example, the Commission recently received a call from an assistant U.S. attorney who wished to discuss a guideline application issue arising in a case that he had been investigating for some time. During the considerable time the defendant in the case was under surveillance, he sold a total of 700 grams of powder cocaine. In preparing a charging document

and a strategy for the case, the assistant had reason to believe that the defendant was a midlevel dealer who deserved at least the 5-year sentence mandated by the Congress and required under the guidelines.

When the defendant was arrested, the agent seized an additional 70 grams of cocaine. Now one would think this 10-percent increase in cocaine quantity would not substantially change the culpability of the defendant nor his sentence. However, the 70 grams of cocaine happened to be in the crack form. Under current sentencing law, 70 grams of crack results in a mandatory minimum 10-year sentence and the 700 grams of powder becomes largely irrelevant to the punishment. It simply doesn't make sense.

The Commission's proposed guideline amendment which equates base—base sentences for crack and powder cocaine offenders while at the same time providing appropriate enhancements for case-specific harms will eliminate this anomaly. It is a sentencing system that targets both the predatory street offender and the large-scale trafficker and yet restores fundamental fairness to sentencing law.

It is a—it is true that a report has found that crack is associated with greater dangers than powder cocaine, and the Commission has addressed these greater dangers with the specific aggravating factors. As Chairman Conaboy stated earlier, under the amended sentencing policy, taking into account both these base sentences and enhancements, average sentences for crack cocaine offenders will still remain significantly higher than sentences for powder offenders.

Let me illustrate. The chart that is now being displayed shows how crack and powder offenders will be sentenced under the revised system. Because certain specific harms are more commonly associated with crack cocaine than powder cocaine at all quantity levels, crack offenders, as you can see from the chart, on average, will receive significantly greater sentences than powder offenders. When a firearm is present in a cocaine offense, when a defendant uses a juvenile in cocaine—in a cocaine crime, when a gang is involved, the guidelines provide for stiff sentences regardless of whether or not it is crack or powder cocaine or, for that matter, any other drug.

There has been some suggestion that rather than making the adjustment recommended, the Commission should simply raise the powder cocaine penalties to the crack cocaine levels. While at first blush this may seem appealing, there are several serious problems with such a proposal. First, cocaine sentences are now quite harsh and at the current levels, we are incarcerating increasing numbers of defendants for increasingly longer periods of time. We have received no serious complaints from the Congress, from law enforcement or others that these levels are too soft.

Second, with the exception of crack cocaine, sentencing levels for different drugs were created under a comprehensive plan to attack midlevel and upper-level dealers. The legislative history of the 1986 Anti-Drug Abuse Act makes that perfectly clear.

Commission research shows that with the exception of crack cocaine, presently this system is working fairly well. With crack, however, the most typical Federal defendant is a street-level dealer. These defendants are receiving sentences comparable to mid-

level and the most serious powder dealers. Raising penalties for powder cocaine would distort this sensible structure and result in application of the mandatory minimums to defendants at lower culpability levels.

Finally, the system is currently designed so that heroin dealers are sentenced higher than cocaine dealers, who in turn are sentenced higher than marijuana dealers. That is, more serious drugs are sentenced higher than less serious drugs. Currently, heroin is punished at a 5-to-1 quantity ratio to powder cocaine, while crack is punished at the much more severe 100-to-1 ratio to powder. If Congress were to raise powder penalties to the crack levels, cocaine offenses would be sentenced more severely than those involving heroin, PCP or methamphetamine, all of which are considered to be equally dangerous or more dangerous drugs.

Finally, raising powder penalties to the crack levels would greatly increase the Federal prison population and would require substantial new prison resources at a time when drugs are the largest part of the Federal criminal docket and cocaine offenses are by far the most frequently prosecuted type of drug case.

In closing, I want to speak personally about this issue. I am the son of a police officer and I have spent my professional life as a lawyer and as an officer of the court. I believe in public service and despite what the polls tell us about the current distaste for the Government, I believe in the virtues of public life. I have spent a lifetime of trying to live up to these virtues.

There have been several events that have challenged and defined my commitment to these virtues. For me, one of those moments came when, as U.S. attorney, I prosecuted Darrell Whiting, a notoriously vicious drug dealer who preyed on the inner-city community in Boston. I think our work on that prosecution helped to make the community a little safer and helped me to fulfill the challenge of public service.

To me, this issue today presents another one of those defining moments. It may not be as dramatic, it may not make for great theater, but I believe it is just as important. If we are going to do our jobs properly, we must question why over 90 percent of crack offenders are black and why this group of offenders are all receiving disproportionately higher sentences. We must get some real answers, and if the answers we find are unsatisfactory, we must be a driving force to make the necessary changes in order to achieve parity, fairness and consistency. We cannot simply sit back and say, this isn't the right time or it's too risky to make a change.

The legislation proposed by the Department of Justice which keeps in place the status quo is plainly and simply the wrong answer. In light of the Department's own statements that the current policy is wrong, its legislative proposal is neither responsive nor responsible.

At the Commission, we have stepped up to the plate and we have taken a position on responsible changes. I strongly urge this committee and the Congress to do the same.

Thank you very much for allowing me to testify before you this morning.

Mr. McCollum. Thank you very much, Mr. Budd.

[The prepared statement of Mr. Budd follows:]

PREPARED STATEMENT OF HON. WAYNE A. BUDD, COMMISSIONER, U.S. SENTENCING COMMISSION

Mr. Chairman, members of the subcommittee: it is a pleasure for me to be here today with Commissioner Tacha and Chairman Conaboy under whose strong leadership the Sentencing Commission has firmly confronted the difficult issue of cocaine sentencing policy. It is an issue that has been picked at by so many. Because it raises trying questions of crime, fear, race, and fairness, no matter what position one takes on the issue, it is easy for critics to snipe at one aspect of that position or another. In coming up with its recommendations, the Commission has followed an open and careful approach. We have consulted widely with members of Congress, the Justice Department, other law enforcement agencies, and a variety of interested groups. We have found that almost everybody in a position of political authority is reluctant to take a position on the issue. The reluctance is understandable. Even though almost everyone believes, in the carefully crafted words of the Justice Department, "that an adjustment in the current penalty structure may be appropriate," there is a pervasive fear that if you call for change that lowers a criminal sentence for anybody, let alone for a drug criminal, you will be excoriated about being "soft on crime" or "sending the wrong message on crime." But every once in a while, the proper public policy demands an adjustment and demands the leadership to push for change, because irrational and unfair sentencing policies also send a message. More than a decade ago in the Sentencing Reform Act of 1984, Congress created the Sentencing Commission to eliminate irrational and unfair policies that breed disrespect for the law. Then, in the 1994 Crime Bill, Congress specifically directed the Commission to tackle the cocaine issue. Led by Chairman Conaboy, the Commission did what it was asked to do: face head-on this type of political hot potato and provide the dispassionate, non-partisan leadership on the basis of hard facts and hard data.

As Chairman Conaboy stated, I was appointed United States Attorney for the District of Massachusetts by President Bush in 1989, and subsequently in 1992, he appointed me Associate Attorney General. My first priority and my primary focus as a prosecutor was drug crime. I know firsthand the destruction that drugs bring on a community. When I was sworn in as United States Attorney, I visited with community leaders, with clergy, and with social activists. They told me about the seemingly endless problems of drugs and violence in their inner city communities and they asked for federal law enforcement resources to combat these problems. They told me in particular about the devastating effects drugs have on the minority community, and they told me about the devastation that comes with crack cocaine. As a result of my meetings, my own experience, and my commitment to strong law enforcement, we in Massachusetts created a federal/state/local drug task force, an unprecedented undertaking at the time. Since its creation, that task force has brought to justice some of the biggest drug dealers in New England. And if you have any questions about whether I believe in harsh sentences for drug criminals, just ask those drug dealers. The major traffickers we prosecuted are in prison for life. And that's the way it ought to be. It should be very clear that I'm all for dealing harshly with major drug traffickers.

But just as I am devoted to strong law enforcement, I am also committed to parity, fairness, and consistency in federal sentencing practices. This is the guiding philosophy of the sentencing guidelines, and it is why I was honored to take this position on the Sentencing Commission late last year. As an attorney who has practiced for many years in the Massachusetts courts as well as in the federal system, I know that parity isn't always achieved. I'm concerned that many times judges are inclined to give a break to defendants who look more sympathetic or who share with them a similar ethnic, racial, cultural, or economic background. That simply has been my experience in some cases. Likewise, in some instances, prosecutorial charging decisions and sentencing recommendations often result in uneven treatment for minorities, perhaps for some of the same reasons.

On the issue of cocaine sentencing policy, while the Commission found no racially motivated intent in the creation of the 100-to-1 quantity ratio, there can be no doubt that the higher penalties for crack offenders fall disproportionately on minority defendants. We have prepared some graphs that illustrate this disparate impact. As you can see on the chart now being displayed, 90 percent of all crack cocaine offenders sentenced in federal court—and let me emphasize federal court—in 1994 were Black; six percent were Hispanic, and four percent were White These numbers are compared with the percentage of powder cocaine defendants. Thirty percent of the powder cocaine defendants were Black, 43 percent Hispanic, and 27 White. These numbers are even more startling when you take into consideration that surveys show that the majority of crack users are White.

The depth of the adverse impact becomes that much more evident when you consider that on many, many occasions, there is discretion in law enforcement as to whether to take cases to the state courts, where crack and powder penalties are almost invariably less severe and typically the same, or to the federal courts where crack penalties are staggeringly more steep. While Congress attempted to frame a national policy that would be applied uniformly across the country in all similar drug cases, the Commission's research suggests that uniform application is not occurring. The present record shows vast differences in prosecution practices. Many rural districts, like the Central District of Illinois, have experienced a considerably higher proportion of federal crack cocaine convictions than largely urban districts, like the Chicago-driven Northern District of Illinois. A similar example can be found in Brooklyn, New York which reports a much lower number of federal crack sentencings than Northern and Southern West Virginia. This is so even though, according to New York City Police Department data, 45.8 percent of all drug arrests in 1989 were crack cocaine related.

The adverse impact and disparate prosecution practices, however, do not tell the whole story. The Commission's study of cocaine sentencing policy examined the pharmacology of cocaine, the way it is used and marketed, the violence associated with its use and marketing, as well as the enforcement priorities surrounding cocaine. We looked hard for a justification for the 100-to-1 quantity ratio, and found, unanimously, that there was no empirical or policy justification for it. The point of all this is that the 100-to-1 quantity ratio is simply unfair and unwarranted. The Commission unanimously found this to be the case. The gross unfairness may not have been intended at the time the ratio was created, but it certainly has worked out that way in practice.

Having said that, I must reiterate something Chairman Conaboy stated. The Commission found, and it is firmly stated in our report, that there are certain offense and offender characteristics that apply more often to crack offenders as opposed to powder offenders and which should result in a punishment differential. But in determining the baste sentences to which we will add the enhancements, we all must remember that crack cocaine and powder cocaine are derived from the same drug. And we must remember that without powder cocaine, we would not have crack—crack is prepared by simply cooking powder with baking soda and water. It does not take great skill to prepare it, and the conversion is most often done at the lowest rungs of the distribution chain. The result is that the people being prosecuted for crack cocaine offenses are most often low-level street dealers who buy powder and cook the crack themselves. The policy of punishing these offenders with sentences hugely disproportionate tc those for their suppliers runs counter to the law enforcement policy of seeking higher penalties for those who organize and lead drug rings and who typically are responsible for bringing greater quantities of illegal substances into our communities.

One of the most troubling aspects of the disproportionately high penalties for crack cocaine for me as a former prosecutor is the preponderance of multiple drugs in drug trafficking organizations, especially those involving crack. I don't believe I ever prosecuted a crack case that didn't have powder somewhere up the chain of command. Too often the street-level crack cocaine dealers receive much harsher penalties than the higher-level distributors who sell powder for conversion into crack.

Also, under the current sentencing rules, the fortuity of when and how law enforcement officials catch these poly-drug dealers largely determines the final sentence. For example, the Commission recently received a call from an Assistant United States Attorney who wished to discuss a guideline application issue arising in a case he had been investigating for some time. During the considerable time the defendant in the case was under surveillance, he sold a total of 700 grams of powder cocaine. In preparing a charging document and a strategy for the case, the Assistant had good reason to believe that the defendant was a mid-level dealer who deserved at least the five-year sentence mandated by the Congress and required under the guidelines. When the defendant was arrested, the agents seized an additional 70 grams of cocaine. One would think this 10 percent increase in cocaine quantity would not substantially change the judgment of the culpability of the defendant or his sentence. However, the 70 grams of cocaine happened to be in the crack form. Under current sentencing law, 70 grams of crack results in a mandatory minimum ten-year sentence, and the 700 grams of powder becomes largely irrelevant to the punishment.

Or consider the case of Remard Leon Cherry whose appeal was recently decided by the Fifth Circuit. (See, 50 F.3d 338 (5th Cir. 1995)). Upon his arrest, Mr. Cherry voluntarily consented to a search of his Houston apartment in which police discovered 135 grams of crack and 4.5 kilos of powder cocaine. Mr. Cherry had been described to police by an informant as a regular supplier of crack cocaine in the Hous-

ton area for at least the past two and a half years. Under the current legal regime, the drug offense portion of Mr. Cherry sentence, 166 months, was driven almost entirely by the amount of crack found in the apartment at the time of the search. Had the arrest and search occurred at a fortuitous point when none of the cocaine had been converted into crack, Mr. Cherry would have been subject to only a five-year mandatory minimum under the statute (although the guidelines would have called a sentence in the range of 97–121 months). On the other hand, had all of the cocaine been converted to crack, Cherry would have faced the same mandatory minimum of ten years but a higher guideline range of 235–293 months. The point is, under the current sentencing rules, the sentence of the defendant who deals in both crack and powder, or the defendant who converts his supply of powder into crack a little at a time, may vary by many years based solely on the timing of the arrest.

The Commission's proposed guideline amendment, which equates base sentences for crack and powder cocaine offenders while at the same time providing appropriate enhancements for case-specific harms, will eliminate this anomaly. It is a sentencing system that targets both the predatory street offender and the large scale trafficker and yet restores fundamental fairness to sentencing law. As Chairman Conaboy stated earlier, under the amended sentencing policy, taking into account both base sentences and enhancements, average sentences for crack cocaine offenders will remain significantly higher than sentences for powder offenders. Let me illustrate. The chart now being displayed shows how crack and powder offenders will be sentenced under the revised system. Because certain specific harms are more commonly associated with crack cocaine than powder cocaine, at all quantity levels, crack offenders on average will receive significantly greater sentences than powder offenders. When a firearm is present in a cocaine offense, when a defendant uses a juvenile in a cocaine crime, when a gang is involved, the guidelines provide for stiff sentences regardless of whether it is crack or powder cocaine or any other drug.

There has been some suggestion that rather than making the adjustment recommended, the Commission should simply have raised the powder cocaine penalties to the crack cocaine levels. While this may sound appealing at first glance, there are several serious problems with such a proposal. First, cocaine sentences are now quite severe, and at the current levels, we are incarcerating increasing numbers of defendants for increasingly long periods of time. We have received no serious complaints from Congress, law enforcement, or others that these levels are too soft. Second, with the exception of crack cocaine, sentencing levels for different drugs were created under a comprehensive plan to attack mid-level and upper-level dealers. The legislative history of the 1986 Anti-Drug Abuse Act makes that clear. Commission research shows that, with the exception of crack cocaine, presently this system is working fairly well. With crack, however, the most typical federal defendant is a street-level dealer. These defendants are sentenced comparable to mid-level and the most serious powder dealers. Raising penalties for powder cocaine could distort this sensible structure and result in application of the mandatory minimums to defendants at lower culpability levels.

Finally, the system is currently designed so that heroin dealers are sentenced higher than cocaine dealers who in turn are sentenced higher than marijuana dealers. That is, more serious drugs are sentenced higher than less serious drugs. Currently, heroin is punished at a 5-to-1 quantity ratio to powder cocaine while crack is punished at a much more severe 100-to-1 ratio to powder. If Congress were to raise powder penalties to the crack levels, cocaine offenses would be sentenced more severely than those involving heroin, PCP, or methamphetamine, all of which are considered to be equally serious or more serious drugs. Finally, raising powder penalties to the crack levels would greatly increase the federal prison population and would require substantial new prison resources at a time when drugs are the largest part of the federal criminal docket and cocaine offenses are by far the most frequently prosecuted type of drug case.

Our goal, embodied in the amended sentencing guidelines and our legislative recommendation, is for a tough, smart sentencing policy that targets the most dangerous and culpable defendants for the longest prison terms. This is a not a new position for the Commission. In August 1991, under the leadership of Chairman Wilkins, a Reagan-appointed Circuit Judge, the Commission submitted a report to Congress reviewing and analyzing mandatory minimum sentencing statutes in the federal criminal code. This report, submitted in response to a specific congressional directive, found that the sentencing guidelines, unlike mandatory minimum penalties, can be most effective in crime control. Today's Commission, like the Commission in 1991, believes that to effectively control crime, the federal criminal justice system must deal from strength. "The real issue," as Chairman Wilkins said before this very committee in 1993, "is how to most effectively, efficiently, and fairly, achieve this important goal."

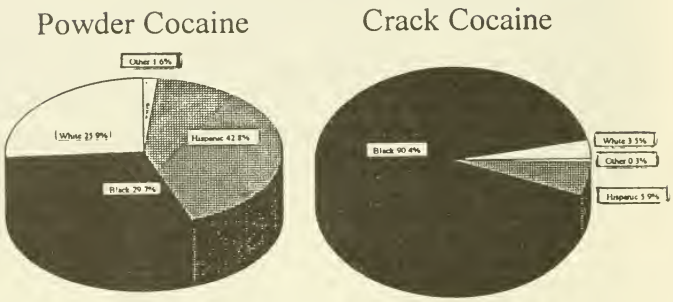
In closing, I want to speak personally about this issue. I have spent my professional life as a lawyer and as an Officer of the court. I believe in public service, and despite what the polls tell us about the current distaste for government, I believe in the virtues of public life. I have spent a lifetime trying to live up to these virtues. There have been several events that have challenged and defined my commitment to these virtues. For me, one of those moments came when as United States Attorney I prosecuted Darrell Whiting, a notoriously vicious drug dealer who preyed on the inner city community in Boston. I think our work on that prosecution made the community safer and fulfilled the promise of public service. To me, this issue presents another one of these defining moments. It may not be as dramatic; it may not make for great theater; but I believe it is just as important. If we are going to do our jobs properly, we must question why 88 percent of crack offenders are Black and why this group of offenders are all receiving disproportionately high sentences. We must try to get some real answers. And if the answers we find are unsatisfactory, we must be a driving force to make the necessary changes in order to achieve parity, fairness, and consistency. We cannot simply sit back and say "this isn't the right time," or "it's too risky to make a change." The legislation proposed by the Department of Justice, which keeps in place the status quo, is the wrong answer. In light of the Department's own statements that the current policy is wrong, the legislative proposal is irresponsible. At the Commission, we have stepped up to the plate, and we have made a first go at responsible changes. I strongly urge this Committee and the Congress to do the same.

I thank you again for giving me the chance to testify before this committee. I would be happy to respond to any questions.

Chart III

Race of Powder and Crack Cocaine Defendants

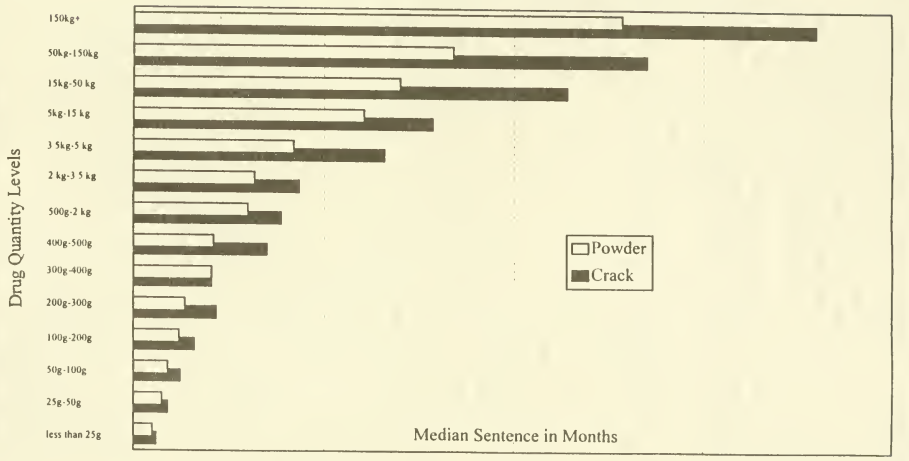
(October 1, 1993 through September 30, 1994)



SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94

Chart IV

Estimated Median Powder and Crack Cocaine Sentences Under Amended Statutes and Guidelines



Sentences for defendants were estimated using the Commission's Prison Impact Model. Departure cases have been excluded from the analysis.
Source: U.S. Sentencing Commission, 1994 Datafile, MONFY94

Mr. MCCOLLUM. I will start the questioning if you will start the timer. I will try to restrain myself to 5 minutes, and each of the panel members—or each of the members of the committee as well, at least for the first round. I know we have a lot of folk, and we are going to try not to go too far into any second rounds.

But I do think the work product that you have produced merits some attention from us, particularly, and you have come some distance to be here.

First of all, I want to commend you for the work. You obviously were divided in the end over what Judge Tacha and all of you have described, what is a very narrow but I think a very important point.

Secondly, I must say that I am predisposed to concur with the general idea that the user issue should not be the predominant one we focus on. It does seem, at least at first blush, as though your conclusions with regard to the 1-to-1 ratio there seem reasonable, though I am openminded if somebody today or later presents me with an argument why that maybe shouldn't be so. But I am disturbed by some of the outcomes that appear to be here in the various possibilities, and I want to question you about them in the area of the distributor or the dealer.

First of all, let me get one thing very clear for the record. You have recommended two things, Judge Conaboy, your Commission: one, as I understand it, are sentencing guideline changes that will become effective if Congress does not intervene to reverse them November 1 of this year; and second, recommendations that we adjust the minimum mandatory sentences in these areas so that the guideline changes you make are—would make more sense. Is that not correct?

Judge CONABOY. That is very accurate, Congressman.

Mr. MCCOLLUM. In light of that, I want to ask a question.

Assuming we don't do anything and we let the Sentencing Guidelines go into effect and—I mean, don't do anything, we don't change the law at all, am I not correct that the results of that would be, in a case of an offender convicted of distributing, let's say, 5 grams of crack with the new Sentencing Guidelines in effect and no changes by us and facing a statutory minimum mandatory penalty, that that person would still have, with 5 grams of crack, a minimum mandatory sentence of 5 years; but somebody convicted of, let's say, a little less than that, 4.9 grams, would face a range of sentences, from zero to 6.

Is that not the net result? And I assume that is why you would like us to change the law.

Judge CONABOY. Yes.

Mr. MCCOLLUM. But if we don't change the law and your Sentencing Guidelines go into effect, that is going to be the result; is it not?

Judge CONABOY. It will be a mixed result, Congressman, yes.

Mr. MCCOLLUM. I just wanted to clarify that, so we knew where we were starting from.

Secondly, with respect to the other bottom-line question, if we adopted, Judge, your—Judge Conaboy; and I am only focusing on you as the Chairman here just to get these out on the table for everybody to discuss. If we adopted, Congress that is, your rec-

ommendations and the Sentencing Guidelines go into effect to treat crack and powder the same for purposes of the base and minimum mandatory penalties, some offenses now subject to a 5- or a 10-year minimum mandatory sentence would potentially receive a sentence involving no prison term at all. Is that not accurate?

Judge CONABOY. That may be a possibility. Some of this is prognostication. One of the jobs of the Commission is to retain statistics and information on every sentence in the U.S. courts. That information indicates to us that it would be a rare case where a crack defendant would not be subject to enhancements, number one, and, secondly, would have a clear criminal record so that he or she would receive that minimal type of sentence that you are talking about. But that is a possibility.

Mr. MCCOLLUM. Well, the other—the other thing that I know is going to come a little later—I am jumping ahead, but you are not going to be around for me to ask it later. The Assistant Attorney General is going to give the illustration when all this is in effect that a defender convicted of distributing 50 grams of crack, or about 500 doses, for whom the current law imposes a minimum 10-year term of imprisonment, would face a guideline sentence of 21 to 27 months of imprisonment. And she says, however, unlike a minimum mandatory sentence, the guideline sentence would be subject to reduction for various guideline factors, so that if the 50-gram trafficker accepted responsibility for his or her offense, the Sentencing Guideline range would be just 12 to 18 months. If the court found the offender also played a minimum role, the Sentencing Guideline range would be reduced to 4 to 10 months, which could be satisfied by probation with home detention.

What I am getting at again is not to reinforce necessarily the next witness' testimony, but to let this illustrate the issue that we are now facing.

Judge CONABOY. And those are possibilities that are there, but they are remote possibilities according to our statistical information, or our information that we gather from past happenings. However, you can develop a possibility along those lines that rarely, if ever, will happen from all that we know.

Mr. MCCOLLUM. Well, I want to.

Judge CONABOY. But it would be misleading or incorrect to say you can't design those possibilities.

Mr. MCCOLLUM. Again, I want to use my first 5 minutes to lay the predicate; there are a lot of other things that I know will be asked. I wanted to go to Mr. Budd, Ms. Tacha—Judge Tacha, ask questions relative to some of the interesting relationships that are here. I have got a feeling my colleagues are going to do that. To the extent they don't, I am going to come back and do it.

But I am going to go to you, Mr. Scott. I want to keep us within the 5-minute rule because we have got a lot of witnesses, and I don't want to overrun it with mine or yours. So, Mr. Scott——

Judge CONABOY. By the way, if I could—and I don't mean to interrupt because of what you were just saying on time—we at the Commission, the staff and so forth, we have lots of data and information that we can make available to your staffs; and we would be happy to do it, because we realize you need that to thoroughly look at this.

Mr. McCollum. Thank you.

Mr. Scott.

Mr. Scott. Thank you, Mr. Chairman. First, I would like to thank you for allowing the witnesses to go a little longer than witnesses usually go. Their testimony was very well prepared and very extensive and extremely helpful, all three; and usually we cut people off at 5 minutes, but you let them go through the whole testimony, and I think that was extremely helpful.

I was particularly impressed with the comments of Mr. Budd because he kind of put the—and Mr. Conaboy—well, I guess all three, because you put the—you put the Sentencing Commission in context, that we are trying to get away from politics. Because if we are forced to try to pick a "crime of the day" and who can be toughest on the crime of the day, we get absurd disparities that you not only have to put this in the context of crack and powder but also murder, rape, robbery and everything else, so that you can look at the whole perspective without being put in a situation where you are voting, up or down, who can outbid the other one on the—on the particular popular crime of the day.

And in that context, what—we are talking about a 5-year mandatory minimum. What kind of crimes, other than possession of hand—little bit of crack, what kinds of crimes get you a 5-year mandatory minimum?

Judge Tacha. We have got a lot. I know bank robbery is one.

Mr. Budd. Use of a weapon in connection with a drug crime; I believe, Congressman, that would be another.

Mr. Scott. Do any other drug crimes get you a 5-year mandatory minimum?

Judge Tacha. All drugs at various levels. I think the answer is, yes, there are a lot of 5-year mandatory minimums for all drugs at differing levels.

Mr. Scott. Let me read this and see that everybody agrees it is accurate.

According to DEA estimates, 500 grams of powder cocaine has a street value of between $32,500 and $50,000. In contrast, 5 grams of crack cocaine, providing 10 to 50 doses, has a street value of between $225 and $750. Thus, at the high end of the scale, a defendant convicted of trafficking 750 dollars' worth of crack would receive the same mandatory minimum 5-year sentence as a defendant who trafficked 50,000 dollars' worth of powder. And presumably if the guy only trafficked 49,000 dollars' worth of powder, he could be looking potentially at probation while the 750 dollars' worth of crack is looking at 5 years' mandatory minimum. Is that said accurately?

Mr. Budd. I think that is a fair statement.

Mr. Scott. With the 100-to-1 ratio, has the Commission—does the Commission have any evidence that people have modified their drug dealing behavior to respond to the 100-to-1 ratio?

Judge Conaboy. We don't have any such information, and tragically, almost the opposite seems to be the case. There is no information that we have that the severe penalties have modified or reduced the availability or the dealing in the drug.

Mr. SCOTT. Now, 5 grams of—a couple hundred dollars' worth of crack, do you have to be convicted of actual distribution, or is it just possession?

Mr. BUDD. Mere possession is enough, Congressman, and it is, I believe—among the drug crimes, it is the only drug where mere possession can warrant a 5-year minimum mandatory penalty.

Mr. SCOTT. OK. So we are talking and, Judge, you mentioned you wanted to differentiate between what were really users and distributors.

Judge TACHA. Yes, let me make it clear. The Commission is absolutely unanimous on the possession and use 1-to-1 relationship.

Mr. SCOTT. Have you seen any effect, that these bidding wars and—that have upped the penalty have done anything to modify drug use or distribution?

Judge TACHA. Well, unless I am mistaken, our report has a line in it or a reference in it that says anecdotally there is some evidence that the high crack penalties will have some effect on whether people are willing to deal in crack. Now—am I correct on that? I am sure I am.

Mr. BUDD. But there has been nothing definitive; I think my colleague would agree in that area.

Judge TACHA. Absolutely.

Mr. BUDD. There is nothing firm.

Judge TACHA. Anecdotal. I know you are out of time. The difficulty with this and one of the frustrating things for you and us—it is probably obvious, but trying to study illegal activity is very difficult.

Mr. MCCOLLUM. Thank you very much.

Mr. SCOTT. I would like to come back to that if I could with maybe this panel.

Mr. MCCOLLUM. We are going to try to do a little bit to get back and we will see how our time is going.

Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman.

First of all, Judge Tacha, my fellow New Mexican, Judge Baldock, is doing well in your district.

Judge TACHA. Thank you very much.

Mr. SCHIFF. Give him my regards.

Judge TACHA. We share chambers in Denver.

Mr. SCHIFF. I understand. We are proud to have you in the tenth circuit. I have to say—by the way, a quick thank you for making that statement that criminal activity is hard to evaluate. I see all these studies about how many people are committing what kinds of crimes; and I often wonder, do they send out the Census Bureau or something? I just wonder, how do they know? But thank you for at least making that observation, it is an inaccurate science.

I would like to ask, particularly, Mr. Conaboy and Mr. Budd, the discussion has been around the 1-to-1 ratio between powder cocaine and crack. If we raise the penalties for powder cocaine to be equal with crack or if we raise, to an extent, powder cocaine and lower crack to be equal, we can achieve 1-to-1 that way, too, can we not?

Mr. BUDD. I believe we can. But as I mentioned in my remarks, Congressman, it would throw off the whole system that the—the guideline system for punishing drug offenses because——

Mr. SCHIFF. Unless you raised the penalties for other drug offenses, too.

Mr. BUDD. But across the board and according to the information that we have had and the extensive surveys that we have made, nobody has really sought to increase the powder penalties. I don't think that is what is required here.

As Judge Conaboy mentioned, Congressman, they are at pretty high levels now and nobody is forgiving them, but they are harsh and they are severe at the present time.

Mr. SCHIFF. But I just want to make it clear, 1-to-1 can be reached in a variety of ways, can it not?

Mr. BUDD. I would believe that it could be, yes.

Mr. SCHIFF. Second, Mr. Budd, looking at your chart there, if I am looking correctly, the red lines are expected sentences for convicted felons of powder cocaine and the blue, of those with crack cocaine?

Mr. BUDD. That is correct, sir.

Mr. SCHIFF. And that is after the adjustments that the majority in the Commission proposed?

Mr. BUDD. That is correct. Those are projected, if you will.

Mr. SCHIFF. I understand. Nevertheless, I see a disparity. I mean, each category that you have there, the blue line, which represents crack cocaine defendants, is longer than the red line for powder cocaine defendants.

Mr. BUDD. I think I can address that if you would like, Congressman.

Mr. SCHIFF. OK.

Mr. BUDD. The reason for that is because the typical crack offenders have some of the other offense characteristics involved in their activity, be it use of violence, be it use of a weapon, be it use of a juvenile. I think that is how we would project the difference, but the base would be the same.

Mr. SCHIFF. I understand. But if you acknowledge that the typical profile of a crack offender is different and certainly you know, of course, that the additional elements must be proven by the prosecutor, which isn't always possible even if the facts exist, would that be a reason not to change the existing disparity on the grounds, if you are assuming that the profile is in fact different between the two, you are just making it harder to give the person the sentence they ought to get in the first place, doing it your way?

Mr. BUDD. Congressman, I will defer to the Chairman in a moment, but you mentioned the idea or the difficulty of proof.

As you know, Congressman, there is a preponderance-of-evidence standard that applies with regard to the aggravating offense characteristics. It is not, as you know, a proof beyond a reasonable doubt, which would be necessary for conviction of the crime itself; so that, in part, addresses what you say.

But there is, as that chart indicates, generally speaking—not always, but generally speaking—other aggravating factors that would be caught up by the guidelines if they are, in fact, amended as we proposed.

Mr. SCHIFF. I am just observing though that if those additional characteristics are as common as they must be for you to project

a profile to us, then I can see an argument for why make the prosecutor go to an additional evidentiary burden?

Mr. BUDD. But if I might respond to that, Congressman. What it doesn't take into account are those crack offenders who haven't been otherwise involved with regard to the aggravating circumstances or activities and, hence, why should they be caught up if in fact they haven't committed those acts?

Mr. SCHIFF. Except if you have got enough who do fit the profile to start projecting sentences, I suspect that must be a minority of those involved with crack, or you could not be projecting for us——

Judge CONABOY. That cuts across, Congressman, in many ways, the very basic concept of the guidelines. And the concept of the guidelines, as you know, when Congress designed them, was to have different sentences for different defendants based on their participation and their culpability in various crimes. So to paint them all with the same brush is what we say causes the problem. And if you start with the same base, which is kind of agreeing with what you are saying, the statement to start with the same base and then only punish those more severely who deserve it, you are more in line with the concept of the guidelines and fairness.

Mr. SCHIFF. Can I have just 30 seconds to conclude, Mr. Chairman?

Mr. MCCOLLUM. Pretty quick. We are pretty strict.

Mr. SCHIFF. I understand. I just want to say there must—ought to be an awful lot who deserve it in order for you to be projecting.

Judge CONABOY. You are correct. That is one of the reasons we wanted to make that clear.

It also goes over to the other projections where you were talking about, you can project minimal sentences, but it is really contrary to our information.

Mr. SCHIFF. I want to add one quick thing. Many years ago when I was a prosecutor in New Mexico, I worked on a proposed State guidelines commission idea, and we found it so difficult and complex we couldn't get it off the ground. You all have my respect for the work you are doing. Thank you.

Judge CONABOY. We have all been through that.

Mr. BUDD. May I just add one tag to what the Congressman said?

You will notice, Congressman, that at the lower-level quantity levels, the disparity, of course, is not nearly as great as it is at the higher levels.

Judge CONABOY. There is another interesting thing there, too, and it goes a little bit to what you said about trying to develop guidelines and make them rational.

Powder dealers, being higher-level people, often have more to offer in the way of information to the prosecutors, so many times they are subject to receiving downward departures or downward movement under the guidelines for cooperation, whereas the low-level crack dealer doesn't know much about the operation and rarely—compared to powder dealers—gets the benefit of any cooperation. He tells you all he knows, but he doesn't know enough to make it worthwhile.

Mr. SCHIFF. To me, that is the consequence of getting involved in crime. Some people don't.

Judge CONABOY. You are absolutely right in that. We are not punishing altar boys here.

Mr. MCCOLLUM. Thank you. I hate to cut it off, but I am going to have to cut it off in order to be fair.

Ms. Jackson Lee, I believe, would be next in the order of questioning.

Mr. Rangel has joined us as our guest, but he is not a member of the committee; and he came in a little late, so I am not trying to be offensive. He is senior, to me even, but I am going to—but I think in due deference he would let the lady go first ahead of him on that side, and then I am going to come to Mr. Heineman and then back to Mr. Rangel.

Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, I certainly would want to make it convenient for this gentleman of wisdom and as long as he is able to question, I will go ahead. But if I need to yield time to him, I would be more than happy to do so.

Mr. MCCOLLUM. He is going to have his—he is going to have his time and he is saying, go ahead; I can see it on his face.

Ms. JACKSON LEE. He is preparing. Thank you very much, Mr. Chairman, and thank you for—and, Mr. Scott, for the gathering of this very broad and indepth set of panels.

If I could share with Mr. Budd, whose testimony I happen to have come in on—and I apologize for being detained; we have had a whirlwind of an evening and morning and last night on the House floor. But in any event, I am looking at a document that—I am sorry that we can't put pictures—I guess this will be in the record, but it is showing a chart, No. 3, and it has crack cocaine and it has a round pie.

Mr. BUDD. We have that chart there.

Ms. JACKSON LEE. Oh, all right. And it indicates race of powder and crack cocaine defendants and I think it has under crack cocaine is that blacks, African-Americans, 90.4 percent. And I guess my comment is that we would have wanted it to work.

We realize the era that we came out of when mandatory sentencing came into being—a rage of crime in this Nation; like all communities, up in arms; drugs seemingly—drugs, plural, seemingly taking over our communities, whether they be inner-city or rural communities, and particularly our younger men.

But here is the question that I pose to you. I think I glean from your notes, or my readings here, that the powder cocaine is considered more addictive. Is that my understanding, or do I need to—or can you correct me on that?

Mr. BUDD. It is stated that neither is physiologically addictive, but because of the intense high from the crack, it might be said that it is more psychologically addictive, one becomes more dependent on it.

Ms. JACKSON LEE. Would that be the powder cocaine?

Mr. BUDD. That would be the crack, I believe.

Ms. JACKSON LEE. That would be the crack?

Mr. BUDD. Yes.

Ms. JACKSON LEE. And the crack is the one that you smoke——

Mr. BUDD. Yes.

Ms. JACKSON LEE [continuing]. If I understand it, and the powder cocaine can be shot up?

Mr. BUDD. It is usually snorted, but it can be mixed with water and injected actually. And when it is—when powder is treated in that fashion, it is—it has the same effect as crack does because of the route of administration. It gets into the bloodstream very quickly and hence causes a more euphoric and a more intense high.

Ms. JACKSON LEE. And I appreciate that description. That is helpful to me.

What would be your estimation in this large segment of this pie, the average sentence of this pool of defendants? Is there a possibility or range of the pool of defendants that are 90.4 percent?

Mr. BUDD. I will see if my colleagues can be of assistance here. But they are probably going to have a sentence range that would encompass a minimum mandatory.

It is being suggested to me that it could be, on average, in excess of 10 years.

Ms. JACKSON LEE. Let me give a hometown or homegrown example and ask how this would be able to happen. First-time offender was in the chain of—sort of the tail end of a so-called drug conspiracy out of Colombia, neighborhood person, got 27 to 35. How would that translated?

Mr. BUDD. No prior criminal history, you are suggesting?

Ms. JACKSON LEE. Absolutely none, married with one child and obviously family is less—left in a desperate situation, though we know a crime was committed.

Mr. BUDD. Yes. Yes, ma'am. Unfortunately, we have to look to the current law and the current Sentencing Guidelines which—we are here today to advocate changes. It must have gone to the quantity of the involvement if it were crack cocaine. It must have been a great deal of crack. But it doesn't have to be that much to make it, just for the 10-year minimum mandatory, 50 grams.

Ms. JACKSON LEE. If I may conclude, Mr. Chairman, as I see my red light.

Thank you, Mr. Budd.

Mr. BUDD. Thank you.

Ms. JACKSON LEE. Then I would just simply pose the question, our job here is to enforce the law. All of us are part of the institution of making sure laws are enforced. What I am seeing firsthand is whether or not we are actually being successful when we have numbers that show us that even though there were crimes committed and we recognize that, and those who do the crime, we have recognized, pay the time.

But when we look at this imbalance, and then we have juxtaposed against that the number that I just gave you, then I would argue that even what I am hearing from my Federal judges—and with due respect to the judges who are here—that it is a problem when there is no discretion.

And so I hope we will have a second round that I can engage in discussions on that issue, because we do want enforcement, we do want people to pay for the crime, but when I hear these kinds of sentences and I see these kinds of numbers, I am—I am convinced that something is not working.

Mr. MCCOLLUM. Thank you very much, Ms. Jackson Lee.

Mr. Heineman.

Mr. HEINEMAN. Thank you, Mr. Chairman. I would like to direct my first question to perhaps each member in 25 words or less, as you know we have a red light, your conclusion on that—possessing or committing a crime with a weapon, in possession of a weapon or by use of a weapon; what is your conclusion of that?

I assume you have been on the bench long enough for the surcharge, whatever the years are for carrying a weapon or using the weapon during the course of a crime. You have seen both situations. Is it—what is your conclusion on the—on the surcharge?

Judge CONABOY. You mean the extent of it?

Mr. HEINEMAN. Yes.

Judge CONABOY. There is an enhancement under the guidelines.

Mr. HEINEMAN. Yes.

Judge CONABOY. So that if there is a weapon used or possessed, then the penalty becomes more severe.

Mr. HEINEMAN. Has it—does it have a deterrent effect?

Judge CONABOY. I don't know. I wish I could say that, but I have—I just read in yesterday's paper a long story about Chief Justice Burger, and he was one of the people over the years who decided that our severe penalties in this country do not seem to have deterrent effects. I don't know whether he was right or wrong. But I can tell you that I have never seen in the years I have been around any evidence that those things do have a deterrent effect.

Mr. HEINEMAN. We are——

Judge CONABOY. I have not seen that. I have been on the bench long enough to see penalties go from rather small penalties to very severe penalties. Our jails are fuller, but I can't say that there is any deterrent effect because the numbers of prosecutions and the numbers of crimes do not seem to reflect that.

Mr. HEINEMAN. OK. We are—we are now studying that currently as, hopefully, a method of getting guns off the street in lieu of the gun control efforts which apparently haven't been successful in the past. We were hoping to have some type of deterrent effect by putting surcharges on criminals for the use of weapons or even for carrying weapons during the course of a crime.

Judge Tasha—Tacha.

Judge TACHA. That is fine.

Mr. HEINEMAN. Hi. How do you pronounce that?

Judge TACHA. Ta-ha, the C is silent.

Mr. HEINEMAN. Your jurisdiction is the tenth circuit; is that correct?

Judge TACHA. I am an appellate judge, and my jurisdiction is the tenth circuit, Denver principally.

Mr. HEINEMAN. We have had mandatory minimums here in the District, and I understand there was some type of sunset on that in the District.

Judge TACHA. In the District of Columbia?

Mr. HEINEMAN. Yes.

Judge TACHA. I don't know the answer to that. I am sorry, I don't work with the District of Columbia and I—there may be, but I don't know.

Mr. HEINEMAN. Do either of you two gentlemen have any idea on that?

Mr. BUDD. I don't know.

Judge CONABOY. I don't know.

Mr. MCCOLLUM. I don't know about the sunset.

I remember the Chief Judge here from the District last week saying there was a dramatic increase in the open-air markets once the tough enforcement began on crack, and so he was reflecting on his experience on deterrents. But I don't recall the sunset provision.

Mr. HEINEMAN. Well, it is my understanding that those minimum standards, those minimum sentences were overruled by the city council; and I have a particular interest in that, being I am on the task force, the D.C. task force, where the criminal justice system is concerned. And I am wondering, would a city council in the District have the authority to overrule or to—to sunset those?

Mr. MCCOLLUM. Mr. Heineman, if I might, if you will yield to me, I understand from counsel and I do recall reading it in the paper, but I have no independent evidence of it that the city ordinances do affect this and they were recently changed to lower the minimum mandatories to—in some of these cases, by the city, very recently. So I think it is pretty obvious the council currently has that authority subject to the congressional delegation of it.

Judge CONABOY. They would have no authority, of course, to roll back any Federal penalties or Federal enforcement at all. That would be penalties that would be promulgated by the District government, but they would have no authority or jurisdiction to impinge on Federal penalties in any way.

Mr. MCCOLLUM. True.

Mr. HEINEMAN. Judge Conaboy, you indicated—I believe it was you, that you have statistics on every sentence in every district.

Judge CONABOY. Yes. We monitor every sentence imposed in a Federal court in the United States. The court must send a copy of the sentencing documents to us at the Federal Sentencing Commission, and we monitor and keep certain pieces of information on every sentence in the country. That is why I said we would be glad to make any of that information available to you that would be helpful in any way to the Congress.

Mr. HEINEMAN. You would—you would have—obviously, the same statistic would refer to the number of prosecutions for the District?

Judge CONABOY. Not the District of Columbia.

Mr. HEINEMAN. Well, across the country.

Judge CONABOY. Nationwide, yes.

Mr. HEINEMAN. I see my time is up, Mr. Chairman.

Mr. MCCOLLUM. Well, thank you very much, Mr. Heineman.

We are joined today by a very distinguished Member of Congress, who is not a member of the Judiciary Committee, but has chaired the Select Committee on Narcotics, and who, I know, has had an interest in this issue and is considered by many of us, including me, to be one of our experts on the subject of narcotics.

And so, Mr. Rangel, we are happy to have you. We do—we are happy to have you here with us today, and please proceed to take your time and question the witnesses.

Mr. RANGEL. I thank you, Mr. Chairman, and the members of the committee, for extending this courtesy to me.

In the close to 25 years that I have been down here trying to get some type of a legislative handle on the narcotics problem that our Nation and the world face, this may be really one of the most important meetings that we could have, because we have a commission of judges who are objective, who are looking at profiles and reaching conclusions that appear to be colorblind. And that has been the most difficult thing that I have been able to do as a Member of Congress, to share with my colleagues that you may want to be colorblind, but this Nation cannot afford to have the luxury to be colorblind.

I thank the Commission for the work it is done. I support the conclusions that you have reached, and this profile that seems to have minorities and black kids in jail. But the Commission went out of its way to say that this does not mean that the penalties are racially motivated, and they have to apply equally to similar defendants regardless of race.

Now, I was born and raised in the Harlem community on 132d Street and Lenox Avenue. I live now on 135th street and Lenox Avenue. You don't know me and I don't know you. But based on the profile of people my age in that community, under this type of thinking, I would assume that I would be more likely to be a criminal than someone else living outside of my community, based on how you reached this conclusion. Well, to help you with your thinking, I——

Judge CONABOY. I was just going to ask you to explore that a little bit more, will you?

Mr. RANGEL. It is a high-crime—a very poor community. It is a high-crime community. Our kids very seldom go to college; there are not many job training programs because really there are not that many jobs. Going to jail is not the worst thing that has happened to some of these youngsters, so they are not afraid of jail and therefore they are not afraid of violence. Most of them that would have the ability to deal with a laptop computer, as the Speaker oftentimes talks, have never seen and understood what one was, but they could break down an automatic weapon and put it back together.

These kids attend more funerals than graduations. They really don't know any professional people, as I didn't, not as friends and not as family. And so once you are born, statistically it shows that one out of four black males will end up either going to jail or coming out of jail; and I understand in Baltimore they say, one out of two.

Then I would assume that if we were going to give some time to anybody for what they are selling, if you take into consideration their background and experience, as a general rule, then automatically it would seem that you just give them more time because, as my colleagues thought, you give them more thought because—in all likelihood, they deserve more time. And this is not racially motivated; it is another factor that causes people who look like me to live together.

And so I want to see how I make out, because the chairman explained to you that I am not one of these people. As a matter of fact, I am a former Federal prosecutor, but I get the impression that I would fall into this category a hell of a lot easier than some-

one else, the profile. And I know we are not racially motivated, but I would just like to bring that out since you have race up there.

Judge CONABOY. I don't know exactly how to respond to that, or whether it is even a question, Congressman.

Mr. RANGEL. It is a question. The question is, is not race a factor?

Judge CONABOY. What I was going to say is this. I think you make a strong case and I think a strong case can be made for the fact that if you live in a poor and deprived area under conditions that you have just described, you are more apt to become involved in crime than somebody who doesn't live under those conditions. And that was one of the things that we considered in our deliberations, and we reached the conclusion that because of that, to say that you should be punished more severely is not correct.

Mr. RANGEL. I support your findings, but there is still some evidence in here that—that the penalties are not racially motivated.

Judge CONABOY. Let me say this. I think we made some presumptions. We did not make any effort to examine, to see whether or not the penalties or the statutes that were passed were racially motivated. We made a presumption that they weren't.

Mr. RANGEL. That they were not?

Judge CONABOY. That they were not.

Mr. RANGEL. My case is, how do you separate it? If you look at me——

Judge CONABOY. Yes.

Mr. RANGEL. Yes, Judge. I am sorry, I am intimidated by a judge.

Judge CONABOY. He is a distinguished judge.

Mr. BUDD. You need not be intimidated by me; I am not a judge.

Judge CONABOY. He is just a prosecutor like yourself.

Mr. BUDD. I am not a prosecutor any longer, but I am a practicing lawyer in Boston, Congressman Rangel.

As Judge Conaboy said at the outset, as we looked at this 100-to-1 ratio and the minimum mandatory law, we didn't find that the intent was racially driven, but certainly in its application, it has been because as you look at the numbers, the people who end up being prosecuted under a very harsh law, 9 times out of 10 are black.

Now, what motivates that? And one can assign a number of reasons. But if it is being applied at the lowest level of street dealer and you find this in the black community, the crack being dealt in the black community, then you are going to catch, 9 out of 10 times, black people or African-Americans.

Mr. RANGEL. Counsel, all I want to know is, I want this not to be racially motivated. My experiences——

Mr. BUDD. Exactly.

Mr. RANGEL [continuing]. Have locked me in a box that sometimes make my colleagues feel I am being unjust, and I would want those of you who agree with most of my colleagues to make this a colorblind society. That is what this new Congress is driven by, that we are colorblind.

And I told my son, who dresses like people in my neighborhood, not to run for a bus; walk wherever you go, because people will not know that he is the son of a Congressman. Now, that is because—

not of my color, but because of where I live and the fact that he would get shot more easily, I am certain that the policeman would not think that his color is a factor, but he comes from a neighborhood where most people who are running—well.

So I am just—I just want you to help me, because I have to deal with the Speaker on these questions quite often as to, if you are catching 9 out of 10 black kids that really, if you told them to go to Colombia to get some drugs, they will be down here in the District. If you told them to launder some money, they would be in a laundromat. They would not know how to buy a ticket to go to a place to buy it.

And we know that our national—our thrust is to get the big guys. Now, we are sweeping up these people who cannot give you any evidence to get any of the big guys. They happen to be black, from poor communities, uneducated, unemployable, that quite frankly don't give a darn about your sentence. They will make out.

It is so unfair, it is so wrong that if we have to find some thread to justify that we didn't ask them to be born black, and if it were white people caught in the same circumstances, we will treat them the same.

We cannot find every time a person does wrong to call it racist, but this is so penetrating. This—the preponderance of evidence would indicate that if a kid just happened to be born white, he would not get caught up in this. You know it and I know it.

Mr. MCCOLLUM. Mr. Rangel, your time—I am being very liberal here. If you have a question——

Mr. RANGEL. Well, you have been, and the burden I carry is very heavy, and I appreciate the fact that you have allowed me this time; and I hope that through the evidence that the Commission has given, regardless of what the results are in terms of what the Congress decides to do or Justice decides to do, that perhaps when we are talking about the drug issue we can bring in lack of hope and poverty and color as a factor even though that subject matter is not within the jurisdiction.

Mr. MCCOLLUM. I feel confident it has come up. I feel it has come up, I have got a funny feeling.

Mr. RANGEL. Thank you, Mr. Chairman. These microphones are feeding back.

Mr. MCCOLLUM. I want to have a quick followup question. I don't want to spend much time because we are running behind schedule. There are a couple of things that just need to be clarified very quickly here.

One of the things that I want to get a clear handle on, there is something that is a difference between Judge Tacha and Mr. Budd over the enhancement question. If I look up here on the chart—that was up there before; I guess the one with the long comparison where you are showing the enhancements. I don't have to see it; I know which one you are talking about, the one that has the streets, the lines on it. Mr. Schiff was talking about 2-to-1, whatever.

I see your point, Mr. Budd, that the length of sentence that somebody is going the get under these guidelines with the crack, because of the probability of their having these enhancements, will be greater. That is what that demonstrates. And I gather the mar-

gin in the bigger and tougher and heavier situations are about 2-to-1 or somewhere in between, maybe not quite that in the longer one up there.

But, Judge Tacha, you seem to be saying that because of these various factors, the fact that crack is more addictive as a substance, that the manner in which crack is marketed is the nature that it is, and its association with violent crime, that that ratio is not enough; that to get what should be a differential, although you are not giving us what it should be, we need to have a base differential to begin with and not just depend on these enhancers.

Can you clarify that, because I think that is a big difference between what you—Mr. Budd is saying and you are.

Judge TACHA. It is really the difference. For us, those increased the market factors, the addictive factors and the societal harms generally, in the view of the dissent, cannot be adequately captured.

We certainly agree with these enhancements and I have no problem when they use a gun, sure, you need to enhance. As in many other kinds of crimes, we use differing base offense levels in the guideline depending on our or your determination of the harms caused by the drug and/or the market itself. And so the difference, I think it is fair to say, between—and I want to say it really is a small difference—is whether we need a different base offense level or whether the enhancements can be taken into account.

Mr. MCCOLLUM. Judge Tacha, it may be a small difference but it is a big difference in outcomes for some people; it just depends where you fall.

Judge TACHA. That is right. And I might just add, that is the reason that the dissent chose to write a written dissent and also to present our views here because we think it important.

Mr. MCCOLLUM. I understand, Mr. Budd, where your views are. I am not trying to cut you off, but I am going to try to be short, because you made your point clear. But I didn't think that Judge Tacha had really responded to that point.

Judge Conaboy, I want to come to you just with one final point about the Sentencing Commission's powers before we conclude here with my questions, and it is a concern I have.

What you have done by changing the guidelines before we do change the actual minimum mandatories, assuming we were to follow your recommendations, it seems to me is potentially going beyond the scope and power that you have in the sense that we now, if this—if your guidelines go into effect November 1, we may have an inconsistency.

There is a safety valve provision from the 1994 crime bill that certain drug offenders are exempted from the statutory minimum mandatories and they are sentenced under the guidelines. In 1994, Congress required that the safety valve sentences be at least 24 months in length. Under the 1-to-1 quantity ratio in the guidelines you are proposing, any crack distributors who qualify for the safety valve would receive guideline sentences of less than 24 months. That is one illustration; there are a couple of others that could be there.

But the point is, simply put, then in a way you are putting the cart before the horse, it seems to me; and I don't know that you

intended to do that, but I have a question. I just think, whether or not you believe you have had the power to do what you have done, you certainly have the power to change the guidelines; but the question has arisen—because of the research that has been done, the question is raised to me, where do you derive the power to do that in the context of—of the charge in the law to the Commission to be consistent with the minimum mandatories?

Judge CONABOY. I don't know that you could find any section of the law that tells us we can do that specifically. As a matter of fact, it was a matter of concern to us. I just talked to my staff about that as late as yesterday, as a matter of fact.

There were some motivating factors, if I can express it that way. We are caught up, as you know, in these cycles where we can only make recommendations on an annual basis, and we have to publish them and have comment on them for a certain period of time.

When I came on the Commission, for instance, the crack thing was one of the first things dropped on my plate. We were told we had to have an answer in 60 days. Congress was good enough to extend the time a bit. In the meantime, we are trying to work out the problem of how it would work in real life in the guidelines. I suppose it might have been presumptuous of us to submit them both at the same time, and I can be candid that we did not discuss that at great length.

Mr. MCCOLLUM. That is fair enough. I didn't want to get into an elaborate discussion. Nobody is slapping you or anything else.

Judge CONABOY. I want you to know that it was not a deliberate decision of ours, regardless of what anybody thought, we think we have that power.

Mr. MCCOLLUM. That is fair enough. I just wanted to know if there had been, and you have explained it. I just saw the potential problems we have discussed today.

I am going to use the prerogative of the Chair and say that I have asked a little bit longer than I normally would, but I would like to try to restrict this. I will let Mr. Scott come back and anybody for a quick second round, but I would ask that you just ask a followup question.

Mr. SCOTT. One followup question.

Judge Tacha, you mentioned the goal of separating users from distributors. How would you do that?

Judge TACHA. I think it is very straightforward in these recommendations. We bring powder to crack to the 1-to-1 level for users and mere possessors. The position of the majority of the Commission is that they would also treat distributors and dealers that way.

My position is, there needs to be a higher ratio, not 100-to-1, for dealers and distributors.

Mr. SCOTT. The law that gives you a 5-year minimum for simple possession, is that the one you are talking about?

Judge TACHA. Yes.

Mr. MCCOLLUM. Thank you, Mr. Scott.

Mr. Heineman.

Mr. HEINEMAN. A short question, a little off crack. Have you found in the past 2 or 3 years that drug prosecutions are lessening at the Federal level?

Judge CONABOY. The drug prosecution——

Mr. HEINEMAN. Yes.

Judge CONABOY. We had somewhat fewer prosecutions in the Federal courts last year than we did in the previous year, and drug prosecutions also decreased slightly. There were about 2,000 less prosecutions in the Federal courts last year, and, of that drop, a little bit less than half of it was due to a drop in drug cases.

Mr. HEINEMAN. Do you have those statistics?

Judge CONABOY. Yes.

Mr. HEINEMAN. Mr. Chairman, do I need a unanimous consent request?

Mr. MCCOLLUM. You really don't. I am sure that they would be happy to supply them. The Commission has been very good about that, and we appreciate it. We probably have those in our material. We will make sure staff gets those to you.

[The information follows:]

U.S. SENTENCING COMMISSION,
Washington, DC, July 17, 1995.

Hon. FRED HEINEMAN, M.C.,
U.S. House of Representatives,
Washington, DC.

DEAR CONGRESSMAN HEINEMAN: This is in response to your question at the recent hearing on Cocaine and Federal Sentencing Policy concerning the number of federal drug prosecutions over the last three years.

The Sentencing Commission maintains data only on the number of defendants sentenced for federal crimes and not on the total number of prosecutions. In fiscal year 1994, of the 39,919 total defendants sentenced in federal court, 16,700 defendants were sentenced for drug crimes. This compares with 42,013 total defendants sentenced in fiscal year 1993 of which 18,452 defendants were sentenced for drug crimes. In fiscal year 1992, 38,081 total defendants were sentenced of which 16,834 were sentenced for drug crimes.

I hope this information is helpful. Please let me know any time we may be of assistance to you.

Sincerely,

RICHARD P. CONABOY, *Chairman.*

Mr. MCCOLLUM. Mr. Rangel.

Mr. RANGEL. I want to know if they have the answers—if not, they can send it in—as to the percentage of these crack-selling defendants pleading guilty without a trial as opposed to the——

Judge CONABOY. We would have that. I don't know whether we have it here available——

Mr. MCCOLLUM. If you can submit that. We will get that to Mr. Rangel.

[The information follows:]

U.S. SENTENCING COMMISSION,
Washington, DC, July 17, 1995.

Hon. CHARLES B. RANGEL, M.C.,
U.S. House of Representatives,
Washington, DC.

DEAR CONGRESSMAN RANGEL: This is in response to your question at the recent hearing on Cocaine and Federal Sentencing Policy concerning the percentage of federal crack cocaine defendants who plead guilty.

In fiscal year 1994, 82 percent of federal crack cocaine defendants pleaded guilty. This compares with a plea rate of 86 percent for federal powder cocaine defendants and 91 percent for drug defendants involved in other drugs.

I hope this information is helpful. Please let me know any time we may be of assistance to you.

Sincerely,

RICHARD P. CONABOY, *Chairman.*

Mr. RANGEL. I will take a guestimate.

Judge CONABOY. It is probably in the 90-percent area.

Mr. RANGEL. I thank the Commission. We will be able to search for colorblind justice.

Mr. MCCOLLUM. I want to thank all three of you for coming and the Commission itself, thank your colleagues who are not here today. You have an arduous task, and this is a difficult one or it wouldn't be a 4-to-3 split and wouldn't have taken all the analysis you have gone through, and your staff. We will be wrestling with what you have been wrestling with.

Judge CONABOY. I would like to thank all of you. Your questions and the time you gave us today indicate to us that you have the same deep concern that we did, and we hope you will be able to accept our recommendations in that same vein, and we appreciate the time.

Mr. MCCOLLUM. We certainly do. Thank you again.

I will introduce our second panel. Our first and only witness on this panel has been kind enough to be with us all morning, and we know her time is precious, but we appreciate her understanding. This is Jo Ann Harris, the Assistant Attorney General of the Criminal Division of the U.S. Department of Justice and the ex-officio nonvoting member of the U.S. Sentencing Commission.

Prior to her nomination in the fall of 1994 to head the Criminal Division, Ms. Harris was a Manhattan-based sole practitioner with a Federal practice specializing in white-collar defense. She also devoted part of her practice to Federal indigent defense.

Before entering private practice in 1983, she was a Federal prosecutor in the Southern District of New York. From 1979 to 1981 she was based in Washington as Chief of the Fraud Section of the Criminal Division of the Justice Department.

I have gotten to introduce you before, Ms. Harris, and I have been able to say these things, but I understand I won't be able to do that too many more times. We have always enjoyed having you and have gotten along very well, and I have respected your work products. I was a little disappointed to read that a few weeks ago. But we are happy to have you here this morning and however many more times we may get an opportunity to have the benefit of your views. Please give your thoughts and proceed.

STATEMENT OF JO ANN HARRIS, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Ms. HARRIS. I appreciate your remarks, Mr. Chairman, and it is always a pleasure to appear before this committee, and in particular I want to thank you for the opportunity to appear today to discuss sentencing of offenders who violate Federal laws relating to crack cocaine.

Crack—and I think the previous panel has certainly made it clear—is a very serious drug of abuse that is taking its toll on our country and particularly on our most vulnerable communities. The dangers of crack are associated as much with its marketing patterns—that is, street-based marketing in small quantities at affordable prices—as it is with its effects on users. Any changes in crack sentences must take these factors into account.

I would like to commend the members of the U.S. Sentencing Commission, some of whom you had the pleasure of meeting today, for the special report that they produced. I add their staff in fact to that commendation. Everyone worked very hard on the crack report that has been submitted to Congress, the report entitled "Cocaine and Federal Sentencing Policy." It is a valuable resource for your study of the complex issues that are involved here.

In its report, the Commission concludes that there are substantial differences between crack and cocaine powder and that crack is associated with more societal harms than cocaine powder.

The Department of Justice is concerned that equalization of the penalties for crack and cocaine powder trafficking—I underline trafficking—simply does not reflect the significant differences between the two forms of the drug and does not reflect the impact that crack has had on our communities and the effect that a drastic change in penalties would have on deterring those who traffic in this dangerous drug.

We believe, nonetheless, that a review of the current penalty structure is appropriate, and we look forward to working with this subcommittee and with Congress in that review.

Because crack, unlike powder cocaine, is typically broken down and packaged into small quantities for distribution—I would say a single dose is sold on the streets for from $5 to $20—it has become readily available to a large segment of our population, including those most vulnerable—the poor and the young.

Moreover, the ability to sell crack in small quantities has led to street-based marketing patterns heavily associated with violence. Since crack dealers tend to use young people to distribute the drug, the violent crack culture is being transmitted to our youth.

Because of the way it is consumed, small quantities of crack can be very dangerously addictive. This danger follows from the route of administration of the two drugs. Crack is smoked, while cocaine powder typically is snorted. The difference in the most common routes of administration makes crack the more harmful form of cocaine.

Smoking crack produces a more intense and more quickly achieved euphoria than snorting cocaine powder but one that is shorter in duration, and this short but intense high makes the user more likely to administer the drug more frequently and in binges. In short, crack is more psychologically addictive than cocaine powder that is snorted.

The Department's conclusions about the harmful effects of crack as compared to cocaine powder are virtually the same as those reached by the Sentencing Commission, which itself concluded in its report that the higher addictive qualities associated with crack combined with its inherent ease of use can support a higher ratio for crack over powder—from the Commission's report itself at page 183.

The Sentencing Commission recently has taken two steps to lower the crack penalties. You have discussed them today. First, the Commission has recommended that Congress eliminate the differential treatment of crack and cocaine powder in the mandatory minimum penalties currently provided by statutes.

In addition, the Commission has submitted to Congress an amendment of the Sentencing Guidelines that would treat crack and cocaine powder alike under the guidelines regardless of whether Congress first revises the statutory minimum penalties. The Commission's recent action, as you know, was by a 4-to-3 vote.

The Commission's Sentencing Guideline amendments and legislative proposal would reduce crack trafficking penalties to extremely low levels. As a result of the Commission's combined actions, an offender convicted of distributing 50 grams of crack—that is about 500 doses—for whom the current law imposes a mandatory minimum 10-year term of imprisonment, would face a guideline sentence of just 12 to 18 months of imprisonment if he or she accepted responsibility for the offense.

Indeed, some offenses now subject to a 5- to 10-year mandatory prison term could potentially result in a sentence involving no required prison term at all. The message to crack traffickers would be to expand operations in response to a windfall reduction in the cost of doing business.

Even if Congress does not adopt the Commission's recommendations as to mandatory minimum penalties for crack, the Sentencing Guideline amendments the Commission has submitted create serious problems.

The Commission did not make the Sentencing Guideline amendments contingent upon amendment of the mandatory minimum sentences. This means the mandatory minimums will override many guideline sentences and produce sharp cliffs—you will have a clustering of people with entirely different profiles sentenced to the same amount of time. The Sentencing Guidelines should work in concert with, rather than in opposition to, the mandatory minimum sentences.

The majority of the Sentencing Commission believes that crack's greater dangers can be captured through the use of guideline enhancements targeted to particular harms associated with some crack offenses, harms such as sales to juveniles and the use of firearms.

Along with the minority of the Commission, we believe it is not enough to rely on those factors to account for the differences between crack and cocaine powder trafficking in individual sentences. To do so ignores the fact that equally or more culpable defendants will be able to successfully shield themselves from association with the aggravating factors. Moreover, relying on such enhancement overlooks the differences in the societal harms, the systemic harm caused by the drugs themselves.

As you know, the amendments to the Sentencing Guidelines recently submitted by the Sentencing Commission will take effect November 1, 1995, unless Congress acts to the contrary. The Department has submitted a legislative proposal seeking congressional disapproval of the proposed equalization of crack and cocaine powder guideline sentences as they are applied to trafficking offenses.

However, the Department's legislative proposal leaves intact the Sentencing Commission's actions to equalize guideline sentences for simple possession of crack and cocaine powder. We agree with the Commission's recommendation to remove the mandatory minimums with respect to simple possession of crack.

Further, we recognize that the present sentencing structure is not the only one that would vindicate essential law enforcement purposes. In our view, Congress must weigh the policy considerations relating to a particular quantity ratio for the sentencing of crack and cocaine powder trafficking offenses. To do so, Congress needs to consider the specific factors and the consequences of a number of different ratios, if I may suggest.

Let me close by saying in the strongest terms that Federal prosecution efforts in all areas reflect an intent to direct Federal resources fairly and firmly toward the greatest criminal problems devastating our communities. We do not target races; we target criminals. Race is never a factor in our decisionmaking.

We believe that sound drug sentencing policy should reflect a reasoned judgment as to the relative harms to our society of each illicit substance. It is our reasoned judgment, and I believe a responsible judgment, that those who are trafficking in crack cocaine are deliberately exploiting a vulnerable market with a highly addictive, easily marketed, cheap substance in a way that is affecting the quality of life on the streets of our communities. To ensure that their punishment properly reflects the harm that crack is causing, we believe a sentencing differential is necessary between crack and cocaine powder trafficking.

I would be pleased to answer any questions.

[The prepared statement of Ms. Harris follows:]

PREPARED STATEMENT OF JO ANN HARRIS, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss sentencing of offenders who violate federal laws relating to crack cocaine.

Crack is a very serious drug of abuse that is taking its toll on our country, and particularly on our most vulnerable communities. The dangers of crack are associated as much with its marketing patterns—street-based marketing in small quantities at "affordable" prices—as with its pharmacological qualities. Any change in crack sentences must take these factors into account.

I would like to commend the United States Sentencing Commission for its Special Report to the Congress, entitled *Cocaine and Federal Sentencing Policy.* It is a valuable resource which I recommend as you study the issue before you. In its Report, the Commission concludes there are substantial differences between crack and cocaine powder and that crack is associated with more societal harms than cocaine powder.

The Department of Justice is concerned that equalization of the penalties for crack and cocaine powder trafficking does not reflect these significant differences, the impact crack has had on our communities, and the effect a drastic change in penalties would have on deterring those who traffic in this dangerous drug. We believe, nonetheless, that a review of the current penalty structure is appropriate, and we look forward to working with this Committee and with Congress in that review.

THE CRACK MARKET

Because crack, unlike powder cocaine, is typically broken down and packaged into very small and inexpensive quantities for distribution, it has become readily available to a large segment of our population, including those most vulnerable—the poor and the young.

Moreover, the ability to sell small quantities of crack has led to street-based marketing patterns and the development of "crack houses." Violence is heavily associated with the crack trade, both because of its street-based nature as well as the sheer volume of transactions taking place involving these quantities of crack. As the number of deals increases, so too the probability that any one will result in a dispute. Guns are prevalent on the street and are used freely to protect the trade.

As the Sentencing Commission itself concluded, "crack dealers generally, tend to have a stronger association with systemic violence [violence associated with the marketing of a drug] and are more likely to possess weapons than powder cocaine dealers." *Special Report* at 195. Moreover, crack dealers "tend to use young people to distribute the drug at an increased rate." *Id.* Thus, the violent crack culture is being transmitted to our youth.

Effects of Crack and Cocaine Powder Use

Because of the way it is consumed, small quantities of crack can be very dangerous. This danger follows from the route of administration of the two drugs: crack is smoked while cocaine powder *typically* is snorted. This difference in the most common routes of administration makes crack the more harmful form of cocaine.

Smoking crack as compared to snorting cocaine results in significant physiological and psychotropic differences. Those who smoke crack reach maximum physiological effects in approximately two minutes and maximum psychotropic effects in just one minute. In contrast, those who snort cocaine powder reach these effects in 40 and 20 minutes, respectively. Crack that is smoked enters the brain in just 19 seconds, compared to five minutes for cocaine powder that is snorted. *Id.* at 29. Smoking crack is also a more efficient absorption route than snorting powder. *Id.* at 23. However, the duration of effect for crack is shorter than for cocaine powder when snorted: 30 minutes, compared to 60 minutes. *Id.* at 29. Duration of effect is significant because it is related to dependency; because of the short but intense nature of the euphoria induced by crack, the user is more likely to administer the drug frequently and in binges. *Id.* at 28. In summary, crack is more psychologically addictive than cocaine powder.

The Department's conclusions about the harmful effects of crack as compared to cocaine powder are virtually the same as those reached by the Sentencing Commission, which itself concluded: "[T]he higher addictive qualities associated with crack combined with its inherent ease of use can support a higher ratio for crack over powder." *Id.* at 183.

Sentencing Commission's Actions

On May 1, 1995, the United States Sentencing Commission submitted to congress amendments to the sentencing guidelines, policy statements, and official commentary that would equalize penalties for cocaine base (which is usually in the form of crack) and cocaine powder. The resulting penalties for crack would be at the current levels for cocaine powder. These amendments, adopted by a 4–3 vote, will take effect November 1, 1995, unless an Act of Congress provides otherwise.

The Sentencing Commission has actually taken two steps to lower crack penalties. First, the Commission has recommended that Congress eliminate the differential treatment of crack and cocaine powder in the mandatory minimum penalties currently provided by statute. In addition, the Commission has submitted an amendment of the sentencing guidelines to treat crack and cocaine powder alike under the guidelines, both for simple possession and trafficking, regardless of whether Congress first revises the statutory minimum penalties.

The Commission's amendments and legislative proposal would reduce crack trafficking penalties to extremely low levels. As a result of the Commission's combined actions, an offender convicted of distributing 50 grams of crack (about 500 doses), for whom the current law imposes a mandatory minimum 10-year term of imprisonment, would face a guideline sentence of 21–27 months of imprisonment. However, unlike a mandatory minimum sentence, the guideline sentence would be subject to reduction for various guidelines factors. If the 50-gram trafficker accepted responsibility for his or her offense, the sentencing guideline range would be just 12–18 months of imprisonment. If the court found that the offender had also played a minimal role in the offense, the sentencing guideline range would be reduced to 4–10 months of imprisonment, which could be satisfied by probation with home detention.

In short, if Congress adopts the Commission's recommendation to treat crack and cocaine powder alike for purposes of the mandatory minimum penalties, some offenses now subject to a 5- or 10-year mandatory minimum prison term will potentially result in a sentence involving no required prison term at all. The message to crack traffickers would be to expand their operations in response to a windfall reduction in the cost of doing business.

Even if Congress does not adopt the Commission's recommendation as to mandatory minimum penalties for crack, the sentencing guideline amendments the Commission has submitted create serious problems. The Commission did *not* make the sentencing guideline amendments contingent upon amendment of the mandatory

minimum sentences. Thus, the low guideline sentences that would result from equalization of crack and cocaine powder penalties would create tension between the guidelines and the current statutory scheme, with the result that mandatory minimum sentences will override many guideline sentences and produce sharp cliffs in sentencing. Moreover, many sentences that would have been well above the mandatory minimum levels, based on quantity, will be reduced to the mandatory minimum. As a result, distinctions in offense seriousness based on drug quantity will be obliterated in many cases. The sentencing guidelines should work in concert with, rather than in opposition to, mandatory minimum sentences.

Another effect of the Commission's guideline changes, even in the absence of a statutory change in mandatory minimum crack sentences, is that the low proposed guideline sentences will prevail in the case of crack offenders subject to the "safety-valve" exemption from mandatory minimum sentences, 18 U.S.C. § 3553(f). This will result in sentences below the Congressionally mandated guideline floor of 24 months for safety-valve defendants. Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 80001(b)(1)(B).

The majority of the Sentencing Commission believes that crack's greater dangers can be captured through the use of guideline enhancements targeted to particular harms associated with some crack offenses—harms such as sales to juveniles and the use of firearms. To this end the Commission has proposed a new enhancement regarding the possession and use of a weapon for all drug trafficking offenses.

Along with the minority, we believe it is not enough to rely on these factors to account for the differences between crack and cocaine powder trafficking in individual sentences. Relying on such enhancements ignores the fact that equally or more culpable defendants will be able successfully to shield themselves from association with the aggravating factors. Many members of an organization benefit from the fact that a few enforcers carry guns. All distributors should be held accountable for the systemic harms characteristic of the crack trade.

Moreover, relying on enhancements for such factors as using a minor or possessing a firearm overlooks the differences in the harms caused by the drugs themselves. A distributor of crack commits a more serious offense than a distributor of an equal amount of cocaine powder, assuming no aggravating characteristics are present, because the drug distributed by the former is more dangerous to the user and is associated with more systemic violence.

Department's Legislative Proposal

As you know, the amendments to the sentencing guidelines recently submitted by the Sentencing Commission are subject to a 180-day review period and will take effect November 1, 1995, except to the extent that an amendment is modified or disapproved by Act of Congress. See 28 U.S.C. § 944(p). The Department has submitted a legislative proposal seeking Congressional disapproval of the proposed equalization of crack and cocaine powder guideline sentence applicable to *trafficking* offenses. However, the Department's legislative proposal would not overturn the Sentencing Commission's actions to equalize guideline sentences for *simple possession* of crack and cocaine powder.

The present structure is not the only one that could vindicate essential law enforcement purposes. We believe that Congress must weigh the policy considerations relating to a particular quantity ratio for the sentencing of crack and cocaine powder trafficking offenses. To do so Congress needs to consider the specific sentencing consequences of any ratio considered. To choose a ratio because it sounds better than the current 100:1 or the Commission's 1:1 is not enough. The Department urged the Sentencing Commission to provide Congress with the sentencing consequences of a number of ratios and to consider the impact of the safety valve within these ratios. We suggested that these models could illustrate the actual penalty impacts of these ratios, depending upon adjustments in the mandatory minimums. Instead, the Sentencing Commission voted 4–3 to promulgate the 1:1 ratio in the face of inconsistent mandatory minimums and provided Congress no information on a range of options.

Sentencing Policy Applied Fairly

Part of the motivation for the Sentencing Commission's proposed crack amendments relates to a concern about racial bias arising from the current penalty structure. Federal prosecution efforts in all areas reflect an intent to direct federal resources toward the greatest criminal problems devastating our communities. Race is never a factor in our decision-making.

Maintaining a differential in the sentencing of crack and cocaine powder trafficking offenses reflects an attempt to ensure proper punishment of those who prey on the most vulnerable members of our society.

I would be pleased to answer any questions you may have.

Mr. MCCOLLUM. Thank you very much. I think you have clarified a good deal of what we wondered about in terms of what the Justice Department was thinking on some of these matters, though we certainly saw the bill.

I gather that you do not favor maintaining across the board the 100-to-1 ratio for crack and powder offenses with respect to the distribution and sales aspect but that you don't have yet a proposal in hand for us to look at and how we might adjust that. You think it needs to be adjusted but not definitively yet?

Ms. HARRIS. Let me urge you to review the 100-to-1. That is what we have said from the beginning. Let me urge that you really look at the consequences of a number of different ratios, that you bring here all of the circumstances and the factors that interrelate when you are attempting to set sound, responsible sentencing policy.

Mr. MCCOLLUM. Do I understand that we do not anticipate in the near term that you are going to bring forth a recommendation for a specific ratio change to us, just that we look at it and we decide it? Is that what you are saying?

Ms. HARRIS. In the end, of course, it is Congress who will make the policy call as to what is the appropriate ratio that accurately reflects the harm that all illicit drugs cause to our society.

We will be happy to work with you. We have worked with the Sentencing Commission. We urged the Sentencing Commission to bring several ratios to you so that you could see the different consequences.

Mr. MCCOLLUM. But you would recommend that we enact or act on the Sentencing Commission guideline issue simultaneously with anything we do to change the 100-to-1 ratio underlying question, I gather. Or does it make any difference?

Ms. HARRIS. It makes a great deal of sense to deal with all of these issues together. We are in the district courts of this country every day prosecuting cases. As long as this issue remains uncertain and there are things on the table that have not been brought together, we have real problems. It is interfering with our law enforcement efforts.

Mr. MCCOLLUM. You have made that very clear.

One question that Judge Conaboy raised in my mind, he said one of the problems with the system of the 100-to-1 ratio or, for that matter, any differential other than 1-to-1 on distribution was the prosecutorial cooperation in the area of powder.

He indicated in his testimony to us a few moments ago that you probably heard that he felt this was a problem because those who dealt in powder were likely to be dealing in larger quantities, be more important in the vertical chain going up to the source of the cocaine coming into the country, and therefore more likely to get a deal.

What I gathered he said is that if we don't go in there and make this 1-to-1 then this disparity will be there, and, prosecutorial discretion being what it is, in his view I guess it is a bad thing. Do

you have a response to that? Because I heard him say it, and I think the prosecution side which you represent needs to have the opportunity to comment on it.

Ms. HARRIS. When it comes to 5K–1 departures, the kind of cooperation that will permit a defendant to receive at least the opportunity for a lower sentence, a sentence below the guidelines or below the mandatory minimums, we would take it on a case-by-case basis.

I don't believe that there is any evidence across the board that crack defendants are getting any less the opportunity to cooperate with the Government and to earn a 5K–1 opportunity to get a lower sentence.

My staff has just handed me a figure. They are wonderful. If I can read the chart—it would happen that—and the year is the fiscal year of 1994—that 36.5 percent of powder cocaine defendants received substantial assistance departures, which is what Judge Conaboy referred to, and that 32.9 percent of the crack cocaine defendants received substantial assistance departures. So it is about equal.

Mr. MCCOLLUM. Thank you. I am going to go to Mr. Scott.

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. Harris, in terms of the disparity, I read a little earlier that 500 grams of powder cocaine produced 2,500 to 5,000 doses that cost $30 to $50,000. In contrast, 5 grams of crack cocaine produces 10 to 50 doses, street value $225 to $750. If someone were to sell the 225 dollars' worth of crack, they could get more of a sentence than somebody who is selling tens of thousands of dollars' worth of powder. Is that accurate?

Ms. HARRIS. I think that as a general proposition you are right.

Mr. SCOTT. Now, we have heard earlier today that the crack—that powder becomes crack fairly low in the level of distribution, and the theory I thought we were working with is, the higher up you are, the more severe the penalty ought to be. Is that right?

Ms. HARRIS. No. I think the more harm you cause, the more severe the penalty should be. That has to be very much a part of the analysis.

Mr. SCOTT. So that the street dealer, who as soon as you lock him up will be replaced by another street dealer, ought to be punished significantly more severely than the drug kingpin?

Ms. HARRIS. That is not what I am saying. Drug kingpins, believe me, are being severely punished. When you get to the really big cocaine dealers, they are going away for a long, long time, much longer than——

Mr. SCOTT. You just had somebody making tens of thousands of dollars' worth of powder getting less of a sentence than someone who has a couple hundred dollars' worth of crack.

Ms. HARRIS. First of all, you are dealing with a pretty minor cocaine dealer, too. Our analysis really starts with the harm that is being done to the communities.

I must say that if you were listening to Judge Tacha as she explained her perspective on the differences in the two markets, I think that you see that the cocaine market is really an inverted

pyramid and you get the damage across the board with a much smaller quantity of crack cocaine on the streets.

Mr. SCOTT. I think I have made my point, and I guess you have made yours, that you don't agree that there is a problem with tens of thousands' worth of powder being punished less severely than a couple hundred dollars of crack.

Another question. Let me read you a statement I have provided. According to a recent Los Angeles Times article, the U.S. attorney's office in Los Angeles openly admits to targeting its resources towards minority communities. In an interview, Los Angeles U.S. Attorney Nora Minella acknowledged that Federal agents have focused their resources in minority communities where the crack trade is believed to be the most prevalent and violent.

Similar discriminatory patterns exist outside Los Angeles. A 1992 Commission survey showed that only minorities were prosecuted for crack offenses in more than half the Federal court jurisdictions handling crack cases. No whites were federally prosecuted in 17 States and many cities, including Boston, Denver, Chicago, Miami, Dallas, and Los Angeles. Out of hundreds of cases, only one white was convicted in California, two in Texas, three in New York, and two in Pennsylvania. Do you want to comment on that?

Ms. HARRIS. Yes. I think that you will find in California what you have been reading is a newspaper article, I take it——

Mr. SCOTT. It is from a newspaper article. It is a summary—if it is not true, maybe you can respond.

Ms. HARRIS. This applies in California and in other areas of the country as well. Our U.S. attorneys have been charged with working with their local counterparts to develop law enforcement strategies which deal with the most serious criminal problems in their district.

If a U.S. attorney—and I mean to return to this—I don't want to run your time out but will return to it sooner or later—if a U.S. attorney identifies crack trafficking gangs as a very serious problem in their district, they will target crack trafficking and gangs. They will not target races or people because of their ethnic relationships, and I think you will find that true everywhere. I don't think that the U.S. attorney in California is targeting black communities.

Mr. SCOTT. So it is just a coincidence that the only—in fact, the only people being prosecuted in 17 States and many cities are black?

Ms. HARRIS. Mr. Scott, the figures are available in the Department of Justice or from the Sentencing Commission because they are the ones who do in fact have the Sentencing Commission figures. The figure that I have last heard is that 90 percent of crack defendants are black, and the communities that are being harmed by crack, because of the various factors that we have talked about here, I suggest are poor and vulnerable communities.

Mr. MCCOLLUM. Mr. Scott, your time is up.

I asked counsel to copy a letter we have addressing that particular issue from one of the U.S. attorneys in California, and I think it has been submitted to us. We just need to get a copy. That may help you a little bit.

Mr. Heineman, do you have any questions?

Mr. HEINEMAN. Well, I see where the race inferences are coming from, and I can fully understand that, having both worked in Harlem and of course within the city communities in Raleigh, NC. But that is rather a double-edged sword.

Certainly I would want as much law enforcement to be centered on my area as a Congressman, regardless of where it was, where I would try to eliminate as much drug activity in those areas as I could, and I would complain if I didn't get enough law enforcement action.

Of course the prosecutors prosecute what police departments bring in. It is not like prosecutors are directing enforcement to specific areas. They have their hands full. Certainly if my district was not getting the attention law-enforcement-wise where drugs are concerned, the police officials there would certainly be hearing from me.

So it is a double-edged sword. No matter which side you stand on, you have a case, and it is fertile ground for argumentation, but I am not willing to argue that point.

I would like to ask you, what is that substantial assistance departures? What exactly does that mean? Is that leverage? Is that trading off?

Ms. HARRIS. It is in fact a provision of both the Sentencing Guidelines, and there is a provision also in the U.S. Code which will permit a judge, upon motion by the Government, to go below the mandatory minimums or below the guideline sentence that is otherwise imposed upon a defendant if the defendant has provided substantial assistance to the Government.

Mr. HEINEMAN. So there are mitigating circumstances that the judge has in this?

Ms. HARRIS. Yes. That is the defendant's opportunity to cut his losses, so to speak.

Mr. MCCOLLUM. Thank you, Mr. Heinemann.

Mr. Rangel.

Mr. RANGEL. Thank you.

Good meeting you. I understand you are coming back to New York City.

Ms. HARRIS. I am coming home.

Mr. RANGEL. That's great. I like the analogy of wanting to have crimefighters in the areas with the crime. I think I spend more time with the New York City Police Department than anyone else.

Mr. HEINEMAN. I can attest to that.

Mr. RANGEL. The question is that when you have something coming into the country made in a foreign country, naturally our Justice Department view is that we try to get those big purchases, those large distributors.

I think Congressman Scott was making the case that when it comes to who end up in the jails, we don't find a relationship between the efforts in terms of where you can make good arrests. You make your good arrests where the consumers are and consumer distributors are. But you went out of your way not to mention race, so I want to make it clear we have the efforts that we are really after big distributors, right?

Ms. HARRIS. We are after big distributors and also after people and gangs and groups that are causing violence on the streets of our cities and towns.

Mr. RANGEL. OK. So if I were to ask you how we are going to do this, if you were to target the areas that have the gangs and the violence and these young people, would that be the poorer communities in our country?

Ms. HARRIS. Not necessarily.

Mr. RANGEL. Would it be the areas of highest unemployment?

Ms. HARRIS. Not necessarily. Let me tell you——

Mr. RANGEL. The areas with the highest number of African-Americans living there?

Ms. HARRIS. It depends very much—every U.S. attorney in their district is working with the local authorities to identify where the Federal tools can be most helpful.

Mr. RANGEL. It is my experience that I tried the big cases and I just spent time in a room they call 318 allowing all the other people to plead guilty, and they just took the mandatory sentence. I would do that on a Monday morning. The difference in complexion, it was just by chance. But you had to target the community of those people that were pleading guilty. It is not the Justice Department, it is just where we live.

If we are talking about the profile of these people: Are they young? Generally speaking. Are they black? Generally speaking. Are they unemployable? Are they uneducated? It is not you looking for them, they are there.

Ms. HARRIS. I am as concerned as you are, and I am sure that everyone here is, about the impact of these sentencing policies on groups of people, and in particular I have been extraordinarily concerned to hear people talk time and time again about young people being swept up by these sentencing policies.

I hope I am right with my numbers, but I asked my staff to look at the 1994 Sentencing Commission numbers to try to see if that in fact was happening: Are we sweeping up young, poor, black kids without any records, without any reason to be getting the sentences they are?

Mr. RANGEL. Are you checking to find out whether you are sweeping up young black altar boys?

Ms. HARRIS. Let me tell you——

Mr. RANGEL. This group that you are talking about are clean-cut kids, and you are not picking up too many of them.

Ms. HARRIS. There are 3,500 defendants who were sentenced for crack in 1994, 48 of them who are black, who are under 21 years of age, who had no prior record and no gun and no violence; only 48 of them. In fact, 10 percent, only 10 percent, of all crack defendants are under 21.

Mr. RANGEL. What percentage of crack users are white?

Ms. HARRIS. You know what, we don't know, and I will tell you why. That figure in the——

Mr. RANGEL. Have you heard of any figure that is being used?

Ms. HARRIS. Yes. I am not sure it is in the forties. It comes out of a household survey. It surveys one use per year. I don't believe it is a figure that anyone should be relying on.

If one is really concerned about the percentages of people who are really being impacted as users by crack cocaine, I think you need to go to emergency room data, to the DAWN figures. DEA has found that 71 percent of emergency room admissions for crack are——

Mr. RANGEL. I agree. Justice uses household surveys. I have been knocking them because they only use them when they see drugs are down. The truth of the matter is that, for whatever reason, I don't think Justice can just say that it is unfair, it is inequitable, and we don't like what is going on, but we can't recommend to you what you should do.

There is no question that you are dealing with people who are targeted because, for a variety of reasons, they are in communities where they are more vulnerable. To say that they are causing most of the damage when you know these kids can't count, can't use money counters, they can't buy tickets to go to where the drugs are, and we are getting these little people because we say they are shooting people up, and yet I don't see the concentration of those people that are supplying these little villains that are doing the time, the ones that give them the money that make the purchase. As Congressman Scott says, if you got rid of 10 of them today they would be replaced in the afternoon by others.

Mr. MCCOLLUM. I am going to let Ms. Harris answer, but that is your time.

Ms. HARRIS. I think you will find across this country they are not kids.

Secondly, I think you will find that most of the Federal prosecutions in crack cocaine are dealing at least at the 50-gram level and above. In fact, I have lived in Illinois as well as New York, and there are projects by U.S. attorneys going on in the Central District of Illinois that are picking up kilograms of crack.

Mr. RANGEL. Are these laws unfair, what we have before us?

Ms. HARRIS. That was the second thing that I was going to say. We are very concerned about fairness. We think that you need to review the 100-to-1. I understand that the prior administration came in and proposed 20-to-1——

Mr. RANGEL. 100-to-1 is unfair, isn't it?

Ms. HARRIS. I am not accepting unfair. I really think you need to look at it.

Mr. MCCOLLUM. I think the question has been answered, Mr. Rangel.

Mr. Bryant.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman.

I want to add my welcome to you. Before I ask you a question, I want to commend you for the job that you are doing and, from what I have heard since I have been here, setting the correct priorities in terms of disagreeing with the Sentencing Commission that these two, powder and crack, ought to be treated the same, and telling us to look hard at these. Maybe 100-to-1 ratio is too high, but certainly the seriousness of crack cocaine in terms of addiction and violence I think is more substantial than powder cocaine.

Also, I want to commend you for setting priorities for U.S. attorneys for the large drug dealers and particularly the violent criminals, and they are in every district.

I know what I am hearing in this room is not talking about quotas, setting quotas to arrest certain people. What I think I am hearing is a genuine concern about the laws perhaps being unfair, something that we have to determine in Congress. But I do know that a lot of gang activity and a lot of the crack cocaine sales, as it comes in, goes into minority neighborhoods that are comprised in the vast majority of law-abiding citizens who don't want this type of crime, this type of violence, in their activities, and to turn your back as a U.S. attorney and not aggressively prosecute those cases I think works a tremendous disservice to that majority of victims that live in a neighborhood, regardless of whether they are minority or not, and I commend you for that.

I have one question, and you may have addressed this before I arrived. I believe your boss, the Attorney General, has made a statement concerning the issue of sentencing and particularly drug cases that may have dealt more with mandatory minimum sentences. I have one quotation here that, while an adjustment in the current penalty structure might be appropriate, any such adjustment might reflect the greater harm associated with crack as opposed to powder cocaine.

I am thinking about maybe her idea that we ought to do away with mandatory minimums. Is that a concept she has advanced? And, if you can speak for her, why does she think that is appropriate?

Ms. HARRIS. The quote that you have given I think is the Attorney General's statement with respect to the crack cocaine situation.

Mr. BRYANT of Tennessee. I agree.

Ms. HARRIS. That is what she is addressing in that statement, because she does believe—I believe—and surely the Department's position is—I don't want to speak for the Attorney General—that the harms of any illicit drug need to be reflected in the sentencing structure. I just think sound sentencing policy requires that.

To the extent that the mandatory minimums are in place with respect to crack cocaine and powder cocaine, I think that you must look at the mandatory minimums as well as the Sentencing Guideline ratios, mandatory minimum ratios, as you look at the guidelines in order to reach a reasonable, reasoned sentencing structure, and to that extent the mandatory minimums are going to be impacted, I think, as you work through all these issues. You can't do one without the other.

Mr. BRYANT of Tennessee. How are we on our prison population? I know probably more people are in prison from drug sentences than other crimes. I have heard the figure, 60 percent of inmates in Federal prisons are there for drug-related crimes. Aren't those oftentimes the large drug dealers—or not large drug dealers, the other folks that you have targeted, the violent criminals, the people that use guns to shoot up our streets?

Ms. HARRIS. Rather than my guess—and I have not looked at our present statistics recently—I will offer to give you an outline of those.

Mr. BRYANT of Tennessee. Thank you very much.

Mr. MCCOLLUM. Thank you.

Mr. Chabot, do you have questions?

Mr. CHABOT. No questions.

I apologize for being late. I have four subcommittee hearings running at the same time. I will review your testimony. Thank you very much.

Mr. MCCOLLUM. Thank you for coming today and spending the time that you have being with us. I look forward to being able to work with you on this process.

I think the point is being well made—we are going to have a vote, it appears now, maybe even a vote followed by a 5-minute vote. I know the panels, many are from out of town. But it is not realistic to expect that to be exhausted before at least 1:30. We will try to reconvene at 1:30 and recess now and go from there.

Thank you very much.

Ms. HARRIS. Thank you very much.

Mr. MCCOLLUM. The committee will be in recess.

[Recess.]

Mr. MCCOLLUM. I am going to reconvene this Subcommittee on Crime.

I want to, first of all, thank all of you for your patience today. We have been indeed under some trying circumstances based on this voting pattern.

And, Mr. Heineman, I want to thank because he graciously agreed to chair this subcommittee for a few minutes when I knew that, after the last vote, that I was going to be stretched running back to a commitment I had in my office. And it didn't work out because we didn't have two people here for you, but thank you. You were gracious.

We have both been up, as you know, much of the evening. But nothing would compare to forcing any of you to miss a plane or something today. So I want to proceed, and we would hope we will be joined very shortly by some of our colleagues. I informed all of them we were reconvening, including a couple that asked about this just a few minutes ago.

I want to welcome you each, and I am going to introduce you in the order you have already been seated unless—Mr. Heineman, you haven't done the introductions I don't guess, either. All right.

Our first witness is Lyle Strom, U.S. district court judge for the District of Nebraska.

Judge Strom was appointed to the court on November 1, 1985, and elevated to Chief Judge 2 years later in 1987. Judge Strom has been a faculty member at the Creighton University School of Law since 1958 and currently teaches a trial course—trial practice course there. In addition, Judge Strom is Cochairman of the Federal Practice Committee for his district.

Our second witness today is Richard Cullen, former U.S. attorney for the Eastern District of Virginia.

As U.S. attorney, Mr. Cullen worked closely with State and local law enforcement officials in the area of drug-related violent crime. Mr. Cullen has also spent several years in private practice with McGuire, Woods, Battle & Booth in Richmond, VA. Recently appointed by Governor Allen, Mr. Cullen serves on the Governor's Commission on Juvenile Justice Reform and the Virginia Criminal Sentencing Commission.

Our third witness is Douglas McDonald, senior scientist and manager of the law and public policy area at Abt Associates, a policy research organization based in Cambridge, MA.

Trained as a sociologist at Columbia University, he conducts research and writes on a variety of criminal justice policy issues. His areas of interest include sentencing policy, prisons, rehabilitation programs, drug control policies and health policy reform. He is currently conducting a large-scale evaluation of drug treatment programs in the State prison system.

Our fourth witness is Dr. Herbert Kleber—I think I pronounced that correctly—executive vice president and medical director of the Center on Addiction and Substance Abuse at Columbia University.

Dr. Kleber is a professor of psychiatry at Columbia University College of Physicians and Surgeons at the New York State Psychiatric Institute. He also heads a new division on substance abuse within the psychiatric department.

Before coming to Columbia University in November 1991, Dr. Kleber served for 2½ years as the Deputy Director for Demand Reduction in the White House Office of the National Drug Control Policy. Dr. Kleber is the author and coauthor of more than 180 papers, chapters and books dealing with all aspects of substance abuse.

Our next witness is Dr. Jeffrey Fagan, professor of the School of Criminal Justice at Rutgers University.

He is also a visiting professor at the School of Public Health at Columbia University, where he is director of the Center for Violence Research and Prevention. His current research examines the legal and illegal careers of young males and gun use by adolescents.

Dr. Fagan is the editor of the Journal of Research and Crime and Delinquency and coeditor of the Oxford Readers in Crime and Justice. Dr. Fagan received his Ph.D. in 1975 from the State University of New York in Buffalo.

And our sixth witness today is Tim Nelson, special agent for the North Carolina State Bureau of Investigations, a 23-year veteran in narcotics law enforcement.

Mr. Nelson has commanded the Greenville Organized Crime and Drug Task Force since 1987. He has worked on a number of cases in Federal court involving crack, powder cocaine and heroin. Mr. Nelson is now vice chairman of the National Narcotics Officers Association Coalition.

That is a mouthful to say, Mr. Nelson.

Mr. NELSON. Sure is.

Mr. MCCOLLUM. In addition, Mr. Nelson is a part-time student at North Carolina University and a veteran of the U.S. Marine Corps.

Our next witness and final one on this panel is Dr. Arthur Curry. Dr. Curry is a retired principal at the Prince George's County School District. During his distinguished career, he was credited with turning around some of that school district's toughest high schools.

In 1991, Dr. Curry's son—is it Dennis? Denny?

Mr. CURRY. Derrick.

Mr. MCCOLLUM. Derrick. I didn't read this right. I am sorry—was sentenced to 19½ years in prison for his role in a crack cocaine distribution conspiracy. It was his first and only criminal offense.

So I think we have a rather wide spectrum represented on this panel today. Having a panel of this size I know is somewhat cumbersome for all of us, but it does give us an opportunity in the kind of limited forum that we have, as you can see how these things unfold, to hear from a good cross spectrum of critics with respect to what the problem is today, which is pretty straightforward.

The Sentencing Commission has presented to us—I know all of you submitted your statements. I am not going to cut you short. But to the degree, with this size panel, you can summarize, it would be helpful to us. We would like to get to questions at some point here, and I know we are going to get more interruptions with votes as the afternoon progresses.

With that admonition but with open controls, so to speak, in wanting to be flexible, I would turn to Mr. Scott. Do you have a comment?

Mr. SCOTT. Yes. I just wanted to give a particular welcome to Mr. Cullen, who is very well known in the Richmond, VA, area. Served—I missed his introduction. I am sure you mentioned he served as a very distinguished U.S. attorney in the area, has been very active, even after he left the office, trying to work in crime prevention programs. And we are delighted to see him here today.

Mr. MCCOLLUM. Well, I know you have a special interest in that. I do that, too. And I know Mr. Heineman does when we have folks from our area.

But with that in mind, I am going to start with my left to right. There is no particular reason to do that except that is the order in which this has been given to me, the order in which you are seated.

So, Judge Strom, if you could lead off, it would be greatly appreciated.

STATEMENT OF HON. LYLE STROM, U.S. DISTRICT JUDGE, DISTRICT OF NEBRASKA

Judge STROM. Well, thank you, Mr. Chairman and members of the subcommittee; and I thank you for inviting me today. I think I will read my remarks because I think it will be shorter than if I tried to summarize or ad-lib with them.

Mr. MCCOLLUM. Fair enough.

Judge STROM. I have been requested to present my views on the present recommendation of the U.S. Sentencing Commission that the U.S. Congress revisit the 100-to-1 quantity ratio as it is applied to crack and powder cocaine. I was privileged to listen to the Sentencing Commission make part of its presentation, and I, all I can say is "amen" to that presentation.

When Congress established the Sentencing Guidelines and the Commission, it defined the Commission's purpose, in part, to provide certainty and fairness in meeting the purposes of sentencing and to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.

Now, all of our goals—the Congress', the Commission's, the U.S. judiciary—is to seek fairness and proportionality in sentencing. We,

just as you, do not want disparity. However, my experience tells me that the 1-to-100 ratio between crack and powder cocaine produces the very disparity which we seek to dispel.

This disparity was clearly brought to my attention 2 years ago when I was required to sentence a group of defendants who had been involved in a conspiracy to distribute cocaine. And I would like to just dwell on one of those defendants, Delano Maxwell. He was one of five who were convicted in this conspiracy. The trial was about 5 weeks to 6 weeks in length. All five were found guilty, and then we went forward with the sentencing process in our court.

Mr. Maxwell was a 33-year-old African-American male with no prior criminal history. He was educated. He had attended and graduated from a 2-year program at the American Institute of Business in Des Moines, IA, subsequently receiving a bachelors degree in management from Simpson College in Iowa.

Because the conspiracy ultimately involved the distribution of crack cocaine, the guidelines applicable to crack cocaine were used. These guidelines produced a criminal history category of 44, with a criminal history category of I. Under the guidelines, it was a mandatory life sentence.

As you know, we now have real-time sentencing. We don't have parole available today in our Federal prison system. And so if I sentence Mr. Maxwell to life, he will indeed spend the rest of his natural life in prison. If he had been found guilty of distributing the same amount of powder cocaine, his offense level would have been 34 with a criminal history category of I, and his sentence would have been 15½ to 18½ years. Similar disparities existed as to the other defendants.

Now, this is only one illustration. Every day we are called on to sentence crack cocaine dealers substantially more harshly than they would be treated if the substance was powder cocaine or some other drug. Less than one-fifth of an ounce, 5 grams of crack cocaine, carries a mandatory 5-year sentence.

Five and a half grams—and I use that because when you convert powder cocaine to crack cocaine you lose a little of the weight of the substance—but 5½ grams of powder cocaine could be easily converted to crack cocaine within a matter of minutes, actually. If it were 5½ grams of powder cocaine, the sentence could be as low as 1 month in prison or maybe 1 month of house arrest followed by probation.

Now, during the course of the sentencing hearings, statistical data was developed from the records of the office of the clerk of our court in Nebraska for the years 1990 through part of 1993 dealing with prosecutions for distribution of powder cocaine and of crack cocaine. The statistics which were developed were consistent with the national statistics which reflected that about 90 percent of all persons prosecuted for distribution or possession with intent to distribute crack cocaine were members of the African-American race, while the substantial majority of those prosecuted for distribution or possession with intent to distribute powder cocaine were of the Caucasian race.

In addition, expert testimony was presented as to the distinction between crack and powder cocaine.

I am not going to get involved in the chemical analysis as there are other witnesses who are far more competent to do that. However, the evidence that was presented during the course of that hearing clearly demonstrated that each form of cocaine contained identically the same molecule. It was not changed or altered in any way by converting it from powder cocaine to crack cocaine.

Secondly, cocaine powder can easily be converted to crack cocaine by adding baking soda, heating and then allowing the substance to cool. This process takes a matter of 20 minutes or so. The precipitant, as I understand it, forms into a rock-like form which is the crack cocaine.

It was clear from the evidence presented that we are dealing with the same substance, just in a different form. I have not seen any evidence which justifies crack cocaine being treated as 100 times stronger or 100 times more dangerous than powder cocaine. The evidence that was presented and the other articles that I have read since that hearing all suggest that whether one uses powder cocaine or crack cocaine, substantially the same high is reached in approximately the same period of time, although I understand it takes slightly more powder cocaine to achieve that same goal. Both of these experts testified that the use of powder cocaine in our society is far more prevalent than the use of crack cocaine.

Added to the foregoing factors is the fact that, as applied, this distinction between crack cocaine and powder cocaine impacts the African-American race and I believe it does so unfairly because the scientific evidence does not support this distinction. Eliminating this distinction would remove the sentencing disparity which has disproportionately impacted young African-American males.

Nor am I aware of any evidence that points to crack cocaine as the cause of more violence in our society any more than the use of powder cocaine. I agree that the problem of drug use in any form is a serious one and is probably one of the causes of violence. However, this violence does not, in my opinion, justify the draconian sentences which we are required to impose because of the 1-to-100 ratio.

The violence which attends the use of drugs can be addressed through sentence adjustments based on the use of weapons and violence and other factors which would be present in the use of the drugs; and that, as I see it, could be applied across the board to all drugs.

It is interesting to note that in most of our States persons convicted of murder or of rape, child molestation and abuse receive sentences substantially lower than those convicted of distributing, in many instances, small amounts of crack cocaine. In Nebraska, for example, a person who commits a murder and receives a life sentence will be eligible for and probably receive parole within 12 to 15 years after the commencement of that sentence.

Because it is now apparent that the 1-to-100 ratio is not supported by either scientific or anecdotal evidence, I would ask this committee and Congress to not only approve the proposed changes in sentencing for crack cocaine but to make this provision retroactive. There are thousands of young black males whom I believe have not been fairly treated by this distinction, and their sentences should be reviewed and recalculated.

We have an opportunity to resolve an unfair and unjust disparity in our sentencing laws, and I urge you to seize this opportunity. And thank you again very much for permitting me to make a few comments on this subject.

Mr. McCollum. We are very happy to have had you here today to do so, Judge Strom. Thank you very much.

[The prepared statement of Judge Strom follows:]

Prepared Statement of Hon. Lyle Strom, U.S. District Judge, District of Nebraska

Mr. Chairman and Members of the Subcommittee, I have been requested to present my views on the present recommendation of the United States Sentencing Commission that the United States Congress "revisit the 100-to-1 quantity ratio" as it is applied to crack and powder cocaine.

When Congress established the United States Sentencing Guidelines and the United States Sentencing Commission, it defined the Commission's purpose, in part, to provide certainty and fairness in meeting the purposes of sentencing and to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. 28 U.S.C. §991.

All of our goals, the Commission's, Congress' and the United States Judiciary, is to seek fairness and proportionality in sentencing. We, just as you, do not want disparity. However, my experience tells me that the one-to-one-hundred ratio between crack and powder cocaine produces the very disparity which we seek to dispel.

This disparity was clearly brought to my attention two years ago when I was required to sentence a group of defendants who had been involved in a conspiracy to distribute cocaine. Let me for a moment briefly review the case of one of those defendants. Delano Maxwell was one of five individuals charged with conspiracy to distribute cocaine. Following a trial of approximately six weeks, all five were found guilty, and it became my duty then to impose sentence. Mr. Maxwell was a thirty-three (33) year-old African American male with no prior criminal history. He was educated, having attended and graduated from a two-year program at the American Institute of Business in Des Moines, Iowa, and subsequently receiving a bachelors degree in management from Simpson College in Iowa. Because the conspiracy ultimately involved the distribution of crack cocaine, the guidelines applicable to crack cocaine or cocaine base were used. Those guidelines produced a criminal history category of forty-four (44) with a criminal history category of I, and under the guidelines, this called for a life sentence.

As you know, in the federal system today, a life sentence means just that as we no longer have parole in our federal prison system. If Mr. Maxwell had been found guilty of distributing the same amount of powder cocaine, his offense level would have been thirty-four (34), with a criminal history category of I, and his sentence would have been 15.5 to 18.5 years. Similar disparities existed as to the other defendants.

This is only one illustration. Every day we are called on to sentence crack cocaine dealers substantially more harshly than they would be treated if the substance was powder cocaine or some other drug. Less than one-fifth of an ounce (5 grams) of crack cocaine carries a mandatory five-year sentence. Five and a half grams of powder cocaine, easily convertible into five grams or more of crack cocaine, can carry a sentence as low as three months in prison and/or three months of house arrest.

During the course of the sentencing hearings, statistical data was developed from the records of the office of the clerk of our court in Nebraska for the years 1990 through part of 1993, dealing with prosecutions for distribution of powder cocaine and of crack cocaine. The statistics which were developed were consistent with the national statistics which reflected that about ninety percent (90%) of all persons prosecuted for distribution or possession with intent to distribute crack cocaine were members of the African American race, while the substantial majority of those prosecuted for distribution or possession with intent to distribute powder cocaine were of the Caucasian race.

In addition, expert testimony was presented as to the distinction between crack and powder cocaine.

I am not going to get involved in the chemical analyses as there are other witnesses who are far more competent to do that, however, the evidence that was presented during the course of that hearing clearly demonstrated that each form of cocaine contained identically the same molecule. It was not changed or altered in any way by converting it from powder cocaine to crack cocaine. Secondly, cocaine powder

can easily be converted to crack cocaine by adding baking soda, heating, and then allowing the substance to cool. This process takes a matter of twenty (20) minutes or so. The precipitant as I understand it, forms into a rock-like form which is the crack cocaine. It was clear from the evidence presented that we are dealing with the same substance, just in a different form. I have not seen any evidence which justifies crack cocaine being treated as one hundred times stronger or one hundred times more dangerous than powder cocaine. The evidence that was presented and the other articles which I have read since that hearing all suggest that whether one uses powder cocaine or crack cocaine, substantially the same high is reached in approximately the same period of time, although it may require a slightly larger quantity of powder cocaine to achieve that goal. Both of the experts testified that the use of powder cocaine is far more prevalent than the use of crack cocaine.

Added to the foregoing factors is the fact that as applied, this distinction between crack cocaine and powder cocaine impacts the African American race and I believe unfairly so because the scientific evidence does not support this distinction. Eliminating it would remove the sentencing disparity which has disproportionately impacted young African American males.

Nor am I aware of any evidence that points to crack cocaine as the cause of more violence in our society any more than the use of powder cocaine. I agree that the problem of drug use in any form is a serious one and is probably one of the causes of violence. however, this violence does not in my opinion, justify the "draconian sentences" which we are required to impose because of the one-to-one-hundred ratio. The violence which attends the use of drugs can be addressed through sentence adjustments based on the use of weapons and of violence in the drug trade.

It is interesting to note that in most of our states, persons convicted of murder or of rape, of child molestation and abuse, receive sentences substantially lower than those convicted of distributing, in many instances, small amounts of crack cocaine.

Because it is now apparent that the one-to-one-hundred ratio is not supported by either scientific or anecdotal evidence, I would ask Congress to not only approve the proposed changes in sentencing for crack cocaine but to make this provision retroactive. There must be thousands of young black males whom I believe have not been fairly treated by this one hundred-to-one distinction, and their sentences should be reviewed and recalculated.

We have an opportunity to resolve an unfair and unjust disparity in our sentencing laws, and I urge you to seize this opportunity.

Mr. MCCOLLUM. Mr. Cullen.

STATEMENT OF RICHARD CULLEN, FORMER U.S. ATTORNEY, EASTERN DISTRICT OF VIRGINIA, AND MEMBER, VIRGINIA CRIMINAL SENTENCING COMMISSION

Mr. CULLEN. Thank you very much, Mr. Chairman. I also will refer to my remarks, but I will try to skip through them in the interests of time.

Mr. MCCOLLUM. Thank you.

Mr. CULLEN. As you know, I am a former U.S. attorney, and I am here to oppose the recommended changes by the Sentencing Commission. It is no exaggeration to assert that much of the success of the law enforcement community in dealing with violent drug gangs is related directly to the tough Federal penalties, particularly the mandatory minimum sentences relating to crack cocaine.

And there are two compelling reasons why the present sentencing scheme for crack cocaine should not be reduced:

First, the most violent drug gangs traffic in crack cocaine. The crack cocaine market and its distribution network are unique because crack is relatively cheap, because it gives a quick high and because the user wants a repeat high. It is a high-volume market that needs a fairly sophisticated and highly efficient distribution market. It is a huge retail business.

Young people, children, are often sucked into this distribution network. Crack is distributed in such a way that territories or turfs are established. They are incredibly valuable, and they beget incredible violence and horror.

Victims of this carnage, those who live predominantly in the inner city and who want nothing more than to live in peace and to reclaim their neighborhood from drug gangs, rightfully look to the Federal Government to wage war on their behalf. They demand that we increase efforts to reduce the violence now commonplace in this distribution of crack. To reduce sentences for those convicted of being part of a drug enterprise, in my view, is an unforgivable breach of faith with these law-abiding citizens.

As U.S. attorney, I saw firsthand the passion with which inner-city residents of Richmond argue for more effective law enforcement in their neighborhoods. In my dealings with inner-city residents, particularly in connection with neighborhood groups demanding action from the Federal Government, no one ever asked me to be lenient or to seek lesser penalties. Far from it, the people who fear for their safety, who are afraid to walk to the grocery store, the people who long to feel safe in their neighborhood, want tougher penalties for drug dealers than those involved in the distribution network, not leniency.

Second, lost in this debate today and I think throughout—throughout the months that this has been debated is the fact that one of, if not the, most effective law enforcement tool is the fear of mandatory minimum sentence and the ability of prosecutors to use this fear to convince lower echelon and middle echelon members of drug gangs to testify and assist the prosecutors against their higher-up coconspirators in return for reduced sentences.

I can recount case after case where a drug gang member, when faced with a mandatory minimum sentence of life in prison, grabbed the only lifeline available to him and cooperated with law enforcement.

Under the present situation, there are enough serious impediments to cooperation. Peer pressure, huge, quick profits and fear of retaliation all act to dissuade a young conspirator to aid the prosecutors. Take away the severe mandatory minimum sentence and make no mistake about it, law enforcement will severely be crippled in its ability to take out drug gangs through cooperating witnesses.

Now, in my remarks—and I won't read them here, Mr. Chairman—there are example after example of how entire gangs were taken out because of the cooperation of lower people who wanted to save themselves and testified against and made the case against the entire gang.

If—for the record, if the record would note on pages 5 and 6 of my remarks, I talk about a gang that started in Brooklyn, NY, went to Washington, DC, and then into Virginia called the Bush-Davis gang. They were responsible for scores and scores of murders in the three districts.

The U.S. attorney's office in Virginia, in D.C. and the district attorney of Brooklyn, NY, working together, were able to convict scores and scores of defendants, none of whom, Mr. Chairman—and this is terribly important—none of whom ever was indicted. They

were brought in, they were told what they were facing under the guidelines and under the mandatory minimum sentences, and they cooperated. And they—and they went up the chain, and a major problem, the most major drug distribution gang in the history of our State was put out of business.

It was my goal as U.S. attorney—and I am certain that is the goal of every member of this committee—to target the top echelon of the drug gang. We focused on eradicating the entire gang with emphasis on the kingpin.

But one thing is absolutely sure. You only get the big guy by working your way up in the organization. Make it more difficult to leverage the mid- and low-level members of the enterprise and you will make the kingpin safer and more secure.

Let's not forget also that there is an incredible profit and greed involved in the distribution of crack cocaine. Every player from the bottom up plays a major role. And without his link in the chain, there would be no successful distribution network.

The low person plays an incredibly important role. We make a big mistake as a nation to diminish the culpability of those involved at every level of the distribution chain.

Drug-related violent crime is truly a cancer on America's inner city. Let's not shed a tear for those who spread this cancer. Rather, let's give them incentives to help themselves, and one way is by cooperating against their bosses.

Drug-related violent crime is a national problem that cries out for a Federal solution. I believe the Federal Government has responded well, but more needs to be done. And our country will be taking a giant step backward if the Congress does not reverse the recommendation of the Sentencing Commission.

Thank you, Mr. Chairman.

Mr. McCollum. Thank you very much, Mr. Cullen.

[The prepared statement of Mr. Cullen follows:]

Prepared Statement of Richard Cullen, Former U.S. Attorney, Eastern District of Virginia, and Member, Virginia Criminal Sentencing Commission

My name is Richard Cullen. I was United States Attorney for the Eastern District of Virginia from 1991 until 1993. I now practice law in Richmond and have been appointed by the Governor to be a member of the Virginia Criminal Sentencing Commission.

While U.S. Attorney, the priority of our office was the prosecution of drug-related violent crimes and particularly the targeting of violent gangs and enterprises.

I am appearing today in opposition to any effort to reduce the mandatory minimum sentence scheme or federal sentencing guidelines now in place for persons convicted of violating federal laws targeting crack cocaine.

The Eastern District of Virginia includes the cities of Norfolk and Portsmouth where drug-related violent crime has reached crisis levels; Richmond which has ranked in the top five in murders every year in the 1990's; and Northern Virginia, which has had its share of horror related to violent drug gangs, including the murder of Corporal Charles Hill of the City of Alexandria Police Department.

It is no exaggeration to assert that much of the success that the law enforcement community has had in dealing with violent drug gangs is related directly to the tough federal penalties, particularly the mandatory minimum sentences relating to crack cocaine.

There are two compelling reasons why the present sentencing scheme for crack cocaine should not be reduced.

First, the most violent drug gangs traffic in crack cocaine. The crack cocaine market and its distribution network are unique. Because crack is relatively cheap, because it gives a quick high, and because the user wants a repeat high, it is a high volume market that needs a sophisticated and highly efficient distribution market.

It is a huge retail business. Young people—children—are often sucked into this distribution network. Crack is distributed in such a way that territories or turfs are established. They are incredibly valuable and they beget incredible violence and horror. Victims of this carnage—those who live predominantly in the inner city and who want nothing more than to live in peace and to reclaim their neighborhoods from drug gangs—rightfully look to the federal government to wage war on their behalf. They demand that we increase efforts to reduce the violence now commonplace in the distribution of crack. To reduce sentences for those convicted of being part of a drug enterprise is an unforgivable breach of faith with these law abiding citizens. As U.S. Attorney, I saw first-hand the passion with which inner city residents of Richmond argued for more effective law enforcement in their neighborhoods. In my many dealings with inner city residents, particularly in connection with neighborhood groups demanding action from the federal government, no one ever asked me to be lenient or to seek lesser penalties. Far from it! The people who fear for their safety, who are afraid to walk to the grocery store, the people who long to feel safe in their neighborhoods want tougher penalties for drug dealers—not leniency.

Second, lost in this debate is the fact that one of, if not *the*, most effective law enforcement tool is the *fear* of the mandatory minimum sentence and the ability of prosecutors to use this fear to convince lower echelon members of a drug gang to testify and assist the prosecutors against their higher-up co-conspirators in return for reduced sentences. I can recount case after case where a drug gang member, when faced with a mandatory minimum sentence of life in prison, grabbed the only lifeline available to him and cooperated with law enforcement.

Under present law, there are serious impediments to cooperation. Peer pressure, huge, quick profits and fear of retaliation all act to dissuade a young co-conspirator from aiding prosecutors. Take away the severe mandatory minimum sentence and make no mistake about it, law enforcement will be severely crippled in its ability to take out drug gangs through cooperating witnesses. Let me give you some examples which by no means are out of the ordinary.

In Richmond in 1991, Eugene Johnson was convicted in part because of the testimony of a cooperating witness who was part of his enterprise but less culpable than he. That witness made the case against Johnson, who police suspected was responsible for the murder of 30 people over several years in a crack cocaine enterprise.

In Richmond in 1992, three members of the Newtown gang were convicted, and I received authorization from Attorney General Barr to seek the death penalty for their involvement in the murders of 15 people in Richmond in just 45 days. Their convictions and subsequent death sentences were the result, in part, of cooperating witnesses who faced mandatory minimum sentences.

The disposition of the cases against the Bush-Davis gang probably make my point even stronger. The Bush-Davis organization was responsible for introducing crack cocaine into Eastern Virginia in March 1988, and some of its members were responsible for the murder of Corporal Charles Hill of the City of Alexandria Police Department. The Bush-Davis organization was responsible for the distribution of more than 400 kilograms of crack cocaine into New York, the Washington metropolitan area and Northern Virginia during its operation between 1987 and 1991, with an estimated street value in excess of $80 million. As a result of a joint investigation involving our office, the U.S. Attorney for the District of Columbia, Jay Stephens, and Charles J. Hynes, District Attorney for King's County, Brooklyn, New York, at least 15 homicides have been solved in New York City and 11 homicides have been solved and at least five convictions obtained in the District of Columbia. As of January 1991, 23 defendants had been convicted in the Bush-Davis investigation. Five received life sentences without parole. In every instance, convictions were obtained without indictment. What is the significance? In each case, the defendant knew that if he did not plead guilty and cooperate, he would receive a life sentence without parole and his only hope was to cooperate and testify against fellow gang members. The bottom line is that an entire drug organization operating in multiple states in the United States was eradicated because of the leverage law enforcement had with mandatory minimum sentences involving crack cocaine.

At the other end of my district in Norfolk, the Gillian gang of 20 involved in a crack cocaine enterprise were convicted of murders and other related offenses to their enterprise. Fourteen individuals pled guilty and the key to these convictions were the cooperation of other targets who faced life if they refused to testify against their co-conspirators.

It was my goal as United States Attorney, and I am certain it is the goal of every member of this committee, to target the top echelon of the drug gang. We focused on eradicating the entire gang with emphasis on the kingpin. But, one thing is absolutely sure: You only get the big guy by working your way up in an organization.

Make it more difficult to leverage the low and mid level member of the enterprise and you will make the kingpin safer and more secure.

Let's not forget also that there is incredible profit and greed involved in the distribution of crack cocaine. Every player, from the bottom up, plays a major role and without his link in the chain there will be no successful distribution network. We make a big mistake as a nation to diminish the culpability of those involved at every level of the distribution chain. Drug-related violent crime is truly a cancer on America's inner cities. Let's not shed a tear for those who spread this cancer. Rather, let's give them incentives to help themselves by cooperating against their bosses.

Drug-related violent crime is a national problem crying out for federal response. I believe the federal government has responded well, but more needs to be done. Our country will be taking a giant step backwards if the proposal of the Sentencing Commission diminishing the significance of crack cocaine becomes the law of the land.

Mr. McCOLLUM. Dr. McDonald.

STATEMENT OF DOUGLAS C. McDONALD, PH.D., SENIOR SCIENTIST AND MANAGER, LAW AND PUBLIC POLICY AREA, ABT ASSOCIATES INC.

Mr. McDONALD. Thank you for inviting me here.

I was asked to discuss the results of my research that was published 18 months ago by the Bureau of Justice Statistics entitled "Sentencing in the Federal Courts: Does Race Matter?"

The Bureau of Justice Statistics came to us because of what they saw was evidence of an emerging gap in sentences imposed on black and white defendants. They came to us partly because, for the past decade, we have been the capacity for the Bureau of Justice Statistics to develop statistical series on transactions in the Federal courts and the Federal criminal justice system. We have produced a number of publications under the BJS banner.

The study was done by my colleague, Kenneth Carlson, and I and, as I mentioned, was published 18 months ago in December 1993. We undertook the study to look at sentences imposed upon all persons convicted in district court between the years of 1986 and midway through 1990. We didn't focus simply on drug offenses.

At the level of all sentences, for all crimes for all offenders, a gap in sentences imposed on black and white offenders emerged during this 4½-year period, and we wrote 250 pages trying to understand why that occurred. I have tried my best to shorten that a little bit.

Mr. McCOLLUM. I understand.

Mr. McDONALD. Two of our major findings were that the gap emerged then—between 1986 and 1990. There wasn't a gap before 1986, before the Anti-Drug Abuse Act of 1986 took effect or before the guidelines took effect.

And, secondly, we discovered that the principal cause of this growing gap was the disproportionate number of blacks sentenced for crack cocaine.

But let me tell you a little bit more about this research. The Sentencing Commission data really begins halfway through 1990. What you have heard is really post-1990.

What we did is, use data from pre-1990. In fact the data system changed in the middle of 1990. When the old administrative office of the court data went out of business. We used that old data to look at the historical pattern here.

In 1986 and 1987 we saw the last gasp of the old regime with respect to sentencing. It was before the Sentencing Guidelines took

effect for crimes committed after November 1987. It was also before offenders began to be sentenced under provisions of the Anti-Drug Abuse Act of 1986.

During that period, there was really no difference in sentences imposed on black, white and Hispanic offenders at the aggregate level, which is to say for all offenders convicted during 1986. The proportion sentence to imprisonment was virtually identical—52 percent for whites and for African-Americans.

The length of the maximum prison term was also essentially identical—50 months for whites and 52 months for black. Hispanics were somewhat more likely to be sentenced to prison. Sixty-six percent went to prison, but they went for shorter periods of time on average, 45 months as opposed to 50. Pattern for drug offenders was also quite similar.

As for drug traffickers: in 1986, 83 percent of whites were sentenced to imprisonment sentences, 85 percent of blacks and 88 percent Hispanics. Those are small differences that don't really amount to much. The average length of sentence was virtually identical, 50—60 months for whites and Hispanics and 59 months for African-Americans.

What happened in subsequent years is that the average length of sentence remained constant essentially for whites. It stayed more or less at about 50 months. That is through the first half of 1990. Except for a blip in 1988, it was pretty constant for Hispanics, as well.

What changed dramatically during this period, however, was the increasing length of sentence for black offenders. It went from 52 months in 1986 to 77 months during the first half of 1990. In other words, in the first half of 1990, blacks were receiving sentences that were 48 percent longer than those imposed on whites.

To understand this, we looked at sentences imposed for the six most common offenses in the Federal system—bank robbery, drug trafficking, embezzlement, fraud, larceny and weapons. We developed a variety of statistical models to try to determine if the differences on sentences imposed on blacks, whites and Hispanics resulted from factors that were legitimately considered at point of sentence—that is, factors that are specified either by sentencing guidelines or statute. And we tried to sort out what wasn't accounted for—how much of the observed race difference was unexplained by any of these legitimately considered characteristics.

Our basic finding is that racial disparities are not pervasive under the Sentencing Guidelines. In fact, observed racial/ethic differences are largely explainable. This 4-month difference is explained in large part by what you have heard today—the disproportionate number of blacks convicted of a specific crime, crack cocaine trafficking.

The cases we looked at during the period from 1989 through June 1990 were the first cases under the Sentencing Guidelines in which we could distinguish crack from powdered cocaine. That couldn't be done in previous years because the data do not say if the cocaine was in crack or powdered form. To discern this fact we used a method of triangulation, looking at the base offense guideline and the reported weight of the cocaine and inferred whether

it was powder or crack because of this 100-to-1 difference in weight.

During this 18-month period, sentences for crack trafficking were very long. They were 141 months on average, or nearly 12 years. For powder, the average sentence was 79 months.

There were—when you looked at those convicted of trafficking in crack, there were small differences in sentences imposed on whites, Hispanics and African-Americans; and those differences could be accounted for by differences in weight or role in the offense. In other words, crack traffickers are basically equal before the law. The only difference is that 83 percent of them during this period were black. Thirty-three percent of those convicted of powder were black.

By the way, one of the panelists asked how many people who were convicted of powder go to prison or escaped being sentenced to prison. During this 18-month period, only 3.5 percent of those convicted of trafficking in powder did not go to prison. Consequently, when you are convicted of a cocaine charge, you go to prison. A very, very small number don't go. That is usually for a substantial assistance to prosecutors.

This disproportionate representation of blacks convicted of crack accounts for about 60 percent of the observed difference in white-black sentencing of all offenders convicted in Federal district court.

We weren't able to determine by looking at the data why there were so many blacks convicted of crack. I mean, this has been partly the discussion. Is it that they are more involved in the crack markets or is the system selecting these people for Federal prosecution.

We did look at cases referred by Federal prosecutors to the Federal courts. However, the data do not identify the race of the defendant, so we couldn't determine if there were differences in the proportions of blacks and whites that Federal prosecutors declined to prosecute.

There is some evidence of selective prosecution found in a special study in California published by Richard Berk. He looked at the transferring of State cases to the Federal courts for prosecution and found what he thought was evidence—or suggestive evidence—of a differential referral rate to the Federal courts for blacks compared to whites. But this is one study. It is not our study. I don't know the data used in this study and cannot comment on the validity of the evidence.

But, I think, to get at the question of selective prosecution requires studies in a variety of jurisdictions, and the data for these studies are tough to find.

We then did two simulations, essentially "what if" exercises. We tested what would have happened in sentencing during this 18-month period from January 1989 to halfway through 1990 if there were no distinction in the law between crack and powder cocaine? We ran the simulation, and what would have happened is that sentences for blacks would have been 10 percent shorter than those for whites, not longer. Had that legal distinction between crack and powder been collapsed, the apparent racial disparity would have evaporated.

There is a halfway step, which is to not to erase the legal distinction but to maintain the mandatory minimums established by the Anti-Drug Abuse Act of 1986 and to incorporate them into guidelines in a slightly different way that the Commission has done. That is, the Sentencing Commission took Congress' mandate with respect to mandatory minimums, the 5-year, the 10-year and the 20-year minimums, and established those as fixed points in the matrix. Because the Sentencing Commission is in the business of trying to establish proportionality in sentencing they created a gradient. So for intermediate weights of drugs increasingly severe guideline sentences were layered on top of the plateaus created by the 5-, 10-, and 20-year minimums. So, instead of a series of three plateaus you had a steep hill—increasingly longer sentences for increasingly larger quantities of drugs.

What would happen if the Sentencing Commission changed the guidelines and said that judges shall sentence to the mandatory minimum sentences only, without enhancing the sentences for intermediate weights. Our simulation shows that the difference between sentences imposed on whites and blacks would have narrowed. It wouldn't have disappeared. It would have been about one-third as great as it was in actual practice.

Since we did this almost 2 years ago, we didn't test alternative hypotheses. What would it have looked like if it had been a 5-to-1 ratio as proposed by the Commission? I would be happy to simulate that at some point, but I can't do it in the next 5 minutes.

These simulations give you some measure of what the effect of two policy options would have been on Federal sentencing during that 18 months.

Thank you.

Mr. MCCOLLUM. Thank you very much, Dr. McDonald.

[The prepared statement of Mr. McDonald follows:]

PREPARED STATEMENT OF DOUGLAS C. MCDONALD, PH.D., SENIOR SCIENTIST AND MANAGER, LAW AND PUBLIC POLICY AREA, ABT ASSOCIATES INC.

Thank you for inviting me to discuss the findings of our research on federal sentencing. During the past decade, Abt Associates has been producing a number of studies of federal criminal case processing, all of which have been published by the Bureau of Justice Statistics under its banner. These were done as part of the Federal Justice Statistics Program for which we were contracted with the Bureau to conduct.

In 1992, we were asked by the Bureau to examine what appeared to be a growing gap in sentences imposed on white and minority defendants. We conducted a detailed analysis of federal sentencing decisions between 1986 and mid-1990, and the results were published by the Bureau of Justice Statistics in December 1994 in a document written by me and my colleague, Kenneth Carlson, entitled *Sentencing in the Federal Courts: Does Race Matter?* One of our major findings was that the difference in sentencing of white and non-white federal offenders is largely accounted for by the disproportionate numbers of African Americans convicted in federal courts for crack trafficking. Congress has chosen to punish offenders convicted of this crime more severely than trafficking in cocaine hydrochloride—or cocaine in its powdered form.

What follows is a short description of this research and our findings. I also examine what the differences in sentences imposed on white and African American offenders would have been if the distinction did not exist in statutory law between crack and powdered cocaine—a legal distinction first drawn by Congress in the Anti-Drug Abuse Act of 1986. I also discuss what the differences would have been if the U.S. Sentencing Commission had chosen an alternative way of incorporating the relevant statutory provisions of the 1986 act into the federal sentencing guidelines.

The Scope of the Study

We examined information about all offenders sentenced in federal district courts between January 1, 1986 and June 30, 1990. This period spanned the two years before the federal sentencing guidelines, mandated by the Sentencing Reform Act of 1984, took effect in November 1987, and the first two years following the imposition of these guidelines. During this period, Congress also enacted mandatory minimum sentences for a variety of federal crimes, including trafficking in crack and powdered cocaine. The information was drawn from data files obtained by Abt Associates as part of its Federal Justice Statistics Program. For this project, we relied principally upon data files provided to us by the Administrative Office of the U.S. Attorneys. We chose to end our study with cases brought to sentence on or before June 30, 1990 because the data series we analyzed was discontinued on that date, and responsibility for some case data was transferred to the U.S. Sentencing Commission. We are confident that our findings from this period are not idiosyncratic.

Our purpose was to identify racial/ethnic differences in proportions of offenders sentenced to incarceration and in the length of incarceration sentences. We categorized offenders into three racial/ethnic groups: white non-Hispanics, African Americans, and Hispanics. We also split cases into two broad groups: those not subject to the guidelines because the offenses were committed before the date of the guidelines' enactment (November 1, 1987) and cases that were subject to the guidelines by virtue of the crimes having been committed after that data. In general, our analytic strategy was to describe differences in sentences imposed on these three populations of offenders and to determine, by means of statistical analysis, if these sentencing differences were attributable to distinctions that were considered legitimate, according to either the statutory law or the federal guidelines.

The Emerging Gap in Sentences Imposed on Whites and African Americans

Between 1986 and mid-1990, a substantial divergence in sentencing patterns in the federal district courts emerged with respect to the sentencing of white and nonwhite offenders. During 1986, before enactment of the sentencing guidelines and the mandatory sentencing provisions of the Anti-Drug Abuse Act of 1986, imprisonment rates were identical for all whites and blacks convicted of federal crimes: 52 percent. Maximum terms for sentences to incarceration were nearly identical: 50 months for whites and 52 months for African Americans. Hispanics were more likely to be imprisoned during this period (66 percent) but their average maximum imprisonment sentences were shorter than whites' (45 months). For those convicted of drug trafficking during this year, a roughly similar pattern was evident. The proportions sentenced to incarceration were similar: 85 percent of African Americans, 88 percent of Hispanics, and 83 percent of whites. The maximum imprisonment terms imposed averaged 60 months for whites and Hispanics, and 59 months for African Americans.

In subsequent years, differences in sentences imposed grew more pronounced. Average length of imprisonment sentences diverged especially sharply. Among federal offenders convicted of all crimes, the average imprisonment sentence imposed on African Americans during the first half of 1990 was 77 months, 48 percent longer than the average maximum sentence imposed on white offenders (52 months). For data on these and intervening years, see the three tables appended at the end of this testimony, which are copied from our full report.

Our research found that this difference at the aggregate level (that is, for offenders convicted of all types of federal offenses) was largely attributable to differences in sentences imposed on those convicted of drug trafficking. Approximately half of those persons sentenced under the guidelines in 1989 and the first half of 1990 were convicted of federal drug offenses, and all but 5 percent of those were convicted of trafficking. These federal drug offenders were also disproportionately African American or Hispanic. Forty-nine percent of all African Americans convicted of federal offenses during this period were sentenced for drug crimes, 59 percent of all Hispanics, whereas 40 percent of all white offenders were so convicted. During the first half of 1990, the maximum sentences imposed on African American drug traffickers averaged 32 percent longer than sentences imposed on white drug traffickers (101 months and 76 months, respectively). The maximum imprisonment sentences for Hispanic drug traffickers during this period averaged 68 months—shorter than the average sentence for white traffickers.

This growing gap in the sentencing of white and African American drug traffickers resulted primarily from the impact of the Anti-Drug Abuse Act of 1986. More specifically: it resulted from the legal distinction drawn in that legislation between crack and powdered cocaine and the higher mandatory minimum sentences required for offenders convicted of the trafficking in crack. This act established five-year

mandatory minimum sentences for persons convicted for manufacturing, distributing, dispensing, or possessing with intent to distribute five or more grams of a mixture containing cocaine base ("crack"), or at least 10 years for 50 grams or more. If the offender had been convicted previously of a drug charge, the minimum terms were doubled, to 10 to 20 years, respectively. A twenty-year minimum was required if death or serious bodily harm resulted from use of the substance. These penalties are more severe than for trafficking in powdered cocaine. Indeed, in fixing the five- and ten-year minima, Congress established the same penalty for 100 times the amount of powdered cocaine.

The Sentencing Commission took these 5, 10, and 20 year minima and created a range of guidelines around them. For example, for a first offender, Congress established that selling 5 grams of crack required at least a five-year sentence. The Sentencing Commission translated this as indicating a base offense level of 26, the range for which is 63 to 78 months. Seeking to maintain the principle of proportionality that was adopted to structured the design of the guidelines, the Commission took Congress' decisions regarding the 5 and 10 gram plateaus as fixed points, and established guideline ranges for amounts above and below 5 grams. Additional categories of drug weights were created within break points at 20 grams, 35 grams, and six other amounts above 50 grams. At each level, the guideline sentence is the same as that for 100 times the weight of powdered cocaine. The result is that the guidelines prescribe at the high end between 188–235 months (or fifteen and a half to nineteen and a half years) for a first offender selling 500 grams of crack or more This range was established not by Congress but by the Sentencing Commission, and was built into the guidelines.

Even though the law began to require different sentences for persons convicted of equivalent weights of crack and powdered cocaine, the automated records kept by the courts did not distinguish the type of cocaine involved prior to mid-1990. Consequently, we had to develop an indirect method of identifying these two types of cocaine traffickers in the data available for the 1987–1990 period. Our method was to exploit the fact that trafficking in small amounts of crack is scored, for purposes of establishing the sentencing guideline, as having the same "base offense level"—one of the two factors used in computing the relevant guideline—as trafficking in 100 times the amount of powdered cocaine. By pairing the weight of the cocaine involved with the base offense level—information that was recorded in the automated records—we were able to determine, by inference, if the drug involved was either crack or powdered cocaine. This procedure permitted us to distinguish unambiguously the form of cocaine in the records for 84 percent of all offenders sentenced for cocaine trafficking in guidelines cases during 1989 and the first half of 1990. Because the base offense levels were not computed in cases not subject to the guidelines, we were unable to distinguish the form of the drug for offenders sentenced after passage of the Anti-Drug Abuse Act of 1986 but before implementation of the guidelines (November 1987).

During 1989 and the first half of 1990, virtually all (99 percent) of those sentenced for trafficking in crack cocaine went to prison, and the average maximum sentence 141 months. For those convicted of trafficking in powder, the 96 percent went to prison, for an average maximum term of 79 months. Among those convicted of crack trafficking, whites were sentenced to maximum terms averaging 130 months, African Americans 140 months, and Hispanics 162 months. Statistical analysis revealed that these differences resulted from legitimately considered distinctions among offenders, including their role in the offense, prior criminal histories, although there were some differences attributable not to the offender's race but the circuit in which they were convicted.

Among those convicted of trafficking in powdered cocaine, there were insignificant differences in proportions sentenced to imprisonment: 96 percent of African Americans, 98 percent of Hispanics, and 95 percent of whites. The maximum imprisonment terms for whites and African Americans were nearly identical: 71 and 73 months, respectively. Average terms for Hispanics were longer—95 months—largely because of the weight of the drug involved in their trafficking offenses. In other words, what appears to be a racial/ethnic difference in sentences for drug trafficking did not result significantly from unwarranted disparities in judicial decision making. Persons convicted of crack trafficking were roughly equal before the law, as were those convicted of trafficking in powdered cocaine.[1]

[1]One caveat needs to be made here. Statistical analysis revealed that a small portion (7–10 percent) of the differences in length of sentences imposed on whites, African Americans, and Hispanics for powdered cocaine could not be accounted for by differences in legitimately considered offense and offender characteristics for which we had information. We were not able to de-

The determining difference, however, was the disproportionate numbers of blacks convicted and sentenced in federal district courts for crack offenses—those crimes that Congress chose to punish severely. During 1989 and the first half of 1990, 83 percent of offenders sentenced for crack trafficking were African Americans, compared to 33 percent of those convicted of trafficking in powder. This explains nearly completely why the average maximum sentence for African Americans cocaine traffickers was so much longer than the average for whites.

Racial/Ethnic Differences Under Alternative Policy and Legal Scenarios

We simulated what the sentencing patterns would have been if the distinction between crack and powdered cocaine had not been made in the law. We developed a model in which we assumed that sentencing for the two forms of cocaine would be the same for the equivalent weights of drug, and that sentencing of crack offenders would follow the guidelines pertaining to powdered cocaine.[2]

If crack and powder were treated identically, average sentences imposed on all crack traffickers would have been much shorter than they actually were: 47 months in prison, rather than the 141-month average actually observed. Sentences for blacks, whites and Hispanics would each have been about two-thirds shorter. As a result, the dissimilarities in sentences imposed on all African American and white offenders convicted of trafficking in any type of cocaine would have diminished dramatically. Indeed, the average sentence for African American cocaine traffickers would have been 10 percent shorter than whites' average sentence, rather than the 30 percent longer average sentence actually observed. This change would have halved the difference in sentences imposed on all white and African American offenders convicted of all crimes in federal district courts during this period.

We also simulated a second scenario: that judges conformed strictly with the mandatory minimum sentencing requirements of the 1986 act but that the Sentencing Commission had not established guidelines for intermediate amounts of drug above the statutorily required mandatory minimum imprisonment terms. Had this occurred, the difference in sentences imposed on whites and African Americans would have narrowed, but not quite as dramatically. For trafficking in any kind of cocaine, sentences for African Americans would have averaged 11 percent longer than for whites, rather than 30 percent longer, as actually imposed.

In summary: eliminating or shrinking the aggregate difference in sentences imposed on whites and African American offenders in the federal courts can be accomplished in two days. First, a simple change in the law, collapsing the distinction between crack and powdered cocaine, would eliminate the major source of racial difference in sentencing outcomes. Second, the Sentencing Commission could also change the way it incorporated the relevant provisions of the Anti-Drug Abuse Act of 1986, which would diminish these differences. Broader reforms, such as tighter restrictions on judicial sentencing discretion generally, are not needed. Whether these changes in law and policy regarding crack and powdered cocaine are desirable is a matter for Congress to decide.

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termine if this residual difference was real or an artifact of our not having information about all legitimately considered characteristics in our statistical estimation models.

[2] This simulation excluded offenders for whom the form of cocaine could not be determined.

Table 3.6

Proportions of Convicted Offenders Sentenced to Incarceration, by Race/Ethnicity, in Non-guideline Cases (1986-1988) and Guideline Cases (January 10, 1989 - June 30, 1990)

	Non-guideline cases						Guideline cases					
Primary offense of conviction	WHITE 1986	BLACK 1986	HISP 1986	WHITE 1987	BLACK 1987	HISP 1987	WHITE 1988	BLACK 1988	HISP 1988	WHITE 1989	BLACK 1989	HISP 1989	WHITE 1990	BLACK 1990	HISP 1990
All offenses	52.1	51.8	65.9	57.9	57.5	73.9	52.2	52.4	65.9	72.1	80.0	86.3	70.7	75.9	82.9
Violent offenses	78.0	83.4	86.7	78.5	86.5	83.0	68.3	79.6	80.9	92.5	95.4	92.6	92.2	95.4	94.6
Murder/manslaughter	87.5	—	—	97.4	90.0	—	100.0	85.0	—	92.0	—	—	91.3	—	—
Assault	40.4	41.5	74.6	40.9	60.5	71.7	36.7	48.4	55.6	58.9	81.7	79.3	64.1	85.2	—
Robbery	94.6	97.0	93.7	94.7	97.0	94.4	90.9	94.4	95.2	99.1	98.9	97.7	99.0	97.9	100.0
Rape	—	—	—	88.9	95.8	—	93.3	—	—	—	—	—	—	—	—
Other sex offenses	48.4	—	—	55.4	73.1	—	39.6	—	—	71.2	—		72.5	—	—
Kidnapping	96.2	—	—	100.0	—	—	90.5	—	—	100.0	—	—	—	—	—
Other	79.2	—	—	74.1	..	..	—	..	..	..	..	..	..	..	..
Property offenses	43.3	43.9	45.6	42.8	46.7	50.5	47.1	41.7	43.7	52.4	55.7	59.9	49.3	45.5	48.5
Fraudulent offenses	41.5	41.5	43.0	45.8	45.0	48.9	46.3	39.9	42.1	52.1	56.6	59.3	49.8	43.9	46.5
Embezzlement	29.2	27.1	17.0	31.8	29.4	24.6	33.3	25.3	30.8	29.3	32.4	23.8	26.6	21.1	17.5
Fraud	45.0	43.4	46.5	52.7	49.7	53.0	50.4	44.6	41.9	59.6	63.8	61.5	58.6	52.8	44.4
Forgery	41.5	46.0	49.1	53.6	47.7	57.1	46.9	42.5	59.2	60.2	66.3	70.0	55.6	49.6	65.5
Counterfeiting	58.3	67.5	57.1	62.1	60.9	56.7	49.2	56.5	55.0	67.3	74.6	61.5	62.6	41.7	63.3
Other offenses	48.6	48.5	53.6	53.0	50.3	55.2	50.0	45.8	48.5	52.9	54.0	62.4	48.1	49.0	61.4
Burglary	76.9	75.0	—	87.9	82.8	—	78.9	88.1	—	96.1	94.1	—	90.6	95.0	—
Larceny	39.5	45.8	50.0	41.2	47.0	54.3	40.4	42.2	46.8	44.3	50.5	51.3	37.6	42.4	52.7
Motor vehicle theft	73.4	70.0	—	75.9	64.6	—	71.8	55.9	—	83.2	—	—	77.8	84.0	—
Arson	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Transportation of stolen property	68.1	60.2	—	73.0	42.9	—	68.4	73.1	—	73.6	75.0	—	73.2	—	—
Other property	21.3	33.3	—	23.5	45.5	—	28.1	31.8	—	29.5	—	—	—	—	—
Drug offenses	75.7	76.0	83.0	77.9	82.8	83.5	73.6	81.5	84.9	85.6	94.1	92.9	85.6	92.4	92.9
Trafficking	82.5	85.1	87.6	85.8	91.7	93.2	85.0	90.1	90.0	92.8	96.9	97.2	91.3	95.6	96.9
Possession and other	23.7	24.8	46.2	22.9	33.5	33.8	18.4	29.9	24.3	33.1	51.1	50.5	27.9	49.6	50.3
Public order offenses	37.6	36.7	53.9	41.5	40.0	66.3	37.8	36.9	47.4	65.3	76.4	81.4	68.2	77.1	82.3
Regulatory offenses	32.5	22.8	41.5	34.9	28.1	51.1	33.6	23.3	48.0	44.5	47.8	68.5	47.8	50.0	67.4
Weapons	60.1	74.7	63.2	66.3	80.0	71.0	61.0	79.0	69.0	79.9	92.2	83.2	75.3	89.8	85.1
Immigration offenses	36.8	44.5	54.8	49.6	44.6	69.7	46.5	50.9	44.2	74.1	77.6	83.4	83.3	84.8	84.5
Tax law violations	45.4	39.0	—	50.2	55.6	52.9	46.8	35.0	65.4	63.1	—	—	64.7	—	—
Racketeering and extortion	78.1	84.2	85.0	77.4	80.4	76.9	75.1	90.0	73.3	83.4	84.0	95.0	79.0	85.2	—
All other	23.7	23.1	49.5	25.5	24.4	54.7	23.1	21.7	38.8	57.8	62.8	75.5	67.5	63.2	85.0

—Too few cases to obtain statistically reliable data

.. No cases of this type occured in the data

Table 3.7

Number of Sentenced Offenders, by Race/Ethnicity, in Non-guideline Cases (1986-1988) and Guideline Cases (January 20, 1989 - June 30, 1990)

Primary offense of conviction	Non-guideline cases									Guideline cases					
	WHITE 1986	BLACK 1986	HISP 1986	WHITE 1987	BLACK 1987	HISP 1987	WHITE 1988	BLACK 1988	HISP 1988	WHITE 1989	BLACK 1989	HISP 1989	WHITE 1990	BLACK 1990	HISP 1990
All offenses	24,190	9,148	6,471	26,124	9,929	7,306	20,382	8,141	3,748	9,809	5,832	5,823	6,329	3,971	3,292
Violent offenses	951	596	165	1,152	619	159	819	422	89	757	373	95	451	240	56
Murder/manslaughter	32	17	8	38	20	8	35	20	6	25	18	13	23	8	11
Assault	171	130	59	193	157	60	139	126	27	73	60	29	39	27	9
Robbery	537	396	79	622	395	71	362	234	42	550	274	44	315	190	28
Rape	8	18	1	27	24	5	10	16	4	12	6	3	5	8	2
Other sex offenses	126	18	7	202	26	10	217	18	4	59	6	0	54	1	1
Kidnapping	53	12	10	43	14	3	21	6	5	21	7	4	8	5	3
Other	24	5	1	27	3	2	15	2	1	17	2	2	10	1	0
Property offenses	7,933	4,465	906	8,446	4,526	932	6,817	3,634	645	2,746	1,768	603	2,000	1,252	528
Fraudulent offenses	5,901	3,040	684	6,340	3,066	691	5,252	2,479	478	1,818	1,179	494	1,379	856	458
Embezzlement	1,165	587	112	1,379	677	122	1,164	581	117	508	309	42	380	218	32
Fraud	3,484	1,445	363	3,898	1,598	411	3,417	1,320	272	891	608	340	766	487	367
Forgery	798	953	169	715	727	98	409	532	49	211	199	60	126	127	29
Counterfeiting	254	55	42	348	64	60	262	46	40	208	63	52	107	24	30
Other offenses	2,032	1,425	222	2,106	1,460	241	1,565	1,155	167	928	589	109	621	396	70
Burglary	78	64	13	107	93	15	76	42	3	51	34	1	32	20	2
Larceny	1,221	1,193	176	1,302	1,201	199	957	980	141	662	513	78	452	340	55
Motor vehicle theft	271	60	8	295	65	7	238	59	9	95	7	14	63	25	7
Arson	14	4	1	13	12	0	8	0	0	4	1	1	1	0	0
Transportation of stolen property	298	84	11	270	56	7	190	52	8	72	20	10	56	9	5
Other property	150	24	13	119	33	13	96	22	6	44	14	5	17	2	1
Drug offenses	6,998	2,002	2,733	8,639	2,658	3,932	5,726	2,023	1,833	4,028	2,851	3,525	2,464	1,973	1,822
Trafficking	6,189	1,699	2,428	7,554	2,249	3,424	4,744	1,735	1,693	3,538	2,677	3,204	2,245	1,836	1,663
Possession and other	809	303	305	1,085	409	508	982	288	140	490	174	321	219	137	159
Public order offenses	8,308	2,085	2,667	7,886	2,106	2,283	7,019	2,062	1,181	2,272	840	1,600	1,414	506	886
Regulatory offenses	1,568	351	246	1,493	320	221	1,257	326	127	530	113	149	328	68	89
Weapons	1,089	403	174	1,120	414	248	916	381	129	706	287	155	498	256	94
Immigration offenses	489	119	1,918	397	112	1,456	254	55	624	274	67	1,164	162	33	618
Tax law violations	1,285	100	12	1,275	108	34	1,186	137	26	60	8	6	51	5	7
Racketeering and extortion	521	57	40	492	56	39	406	80	30	145	50	20	81	27	18
All other	3,356	1,055	277	3,109	1,096	285	3,000	1,083	245	557	215	106	302	117	60

Too few cases to obtain statistically reliable data

No cases of this type occurred in the data

Table 3.8

Average Length of Incarceration Sentence Imposed (in Months), by Race/Ethnicity, in Non-guideline Cases (1986-1988) and Guideline Cases (January 20, 1989 - June 30, 1990) (Offenders Sentenced to Prison Only)

	Non-guideline cases									Guideline cases					
Primary offense of conviction	WHITE 1986	BLACK 1986	HISP 1986	WHITE 1987	BLACK 1987	HISP 1987	WHITE 1988	BLACK 1988	HISP 1988	WHITE 1989	BLACK 1989	HISP 1989	WHITE 1990	BLACK 1990	HISP 1990
All offenses	50 1	51 7	44 9	50 2	54 1	50.1	50.4	54 4	66.3	49.3	67.4	48 2	52.2	76 8	47.2
Violent offenses	126 3	149 9	103 3	114 9	128.4	104.4	122 6	128.6	128.6	85 1	96 9	90 0	86 0	107 9	78 8
Murder/manslaughter	154 3	—	—	176 4	—	—	186.4	—	—	156 0	—	—	83 0	—	--
Assault	61 2	56 1	35 0	32 3	39 4	69.1	53.5	35 6	—	34 5	44 5	34 8	52 4	56 5	—
Robbery	142 8	157.5	119 1	130 8	149.3	120 3	146.5	153 4	151 7	87 3	101 3	94 5	95 0	108 2	78 0
Rape	—	—	—	70 2	127 5	—	97 4	—	—	—	—	—	—	—	—
Other sex offenses	54 4	—	—	42 3	50 0	—	42.3	—	—	38 8	—		28 7	—	—
Kidnapping	155 2	—	—	250 9	—	—	—	—	—	160 5	—	—	—	—	—
Other	33 8	—	—	46 4	—	—	—	—	—	—	—		—	—	—
Property offenses	34 8	29 7	30 0	35 5	30 8	31 3	34 9	27 1	33 3	17 5	14 7	16 6	17 9	16 6	16 0
Fraudulent offenses	32 5	27 7	28.5	33 0	26 4	29 4	32 8	23 8	28 2	14 8	12 6	9 8	15 7	12 1	8 1
Embezzlement	21 1	16 3	—	25 4	18 1	24 5	24 9	15 8	31 0	10 2	6 3	—	11 4	5 9	—
Fraud	33 8	30 7	25 7	33 5	27 7	29 5	33 2	23 1	26 9	14 9	14 9	7 3	17 3	14 1	6 7
Forgery	34 8	27 8	16.3	37 9	28.1	30 8	47.3	29 1	25 9	17 5	10 4	16 3	14 5	9 0	—
Counterfeiting	43 6	23 0	23 3	34 4	27 3	31 0	36.8	41 1	28 6	16 9	15.6	17 0	12 8	—	—
Other offenses	40 5	33 5	33 9	42 4	39.0	36 1	41 2	33.1	45 8	22 6	18 8	14 3	22 9	25 4	19 5
Burglary	71 4	75 9	—	78 2	110.1	—	72 8	60 7	—	46 7	49 4	--	39 3	—	--
Larceny	33 9	30 0	31.4	37.8	29.2	35.1	35.9	28.3	45 2	19 4	13 0	11.7	20.9	20 9	17 4
Motor vehicle theft	47 4	30 5	—	43 7	31 4	-	36 0	29 2	--	17 0	-	-	22 6	13 9	-
Arson	—	—	—	—	—	-	--	-	-	—	—		—		
Transportation of stolen property	42 6	36 2	—	41.2	51.0	—	53.3	55 8	—	27 8	—	—	22 9	--	--
Other property	20.7	—	—	17.7	—	—	22.7	—	—	—	—	—	—	—	—
Drug offenses	58 9	56.9	58 6	59 5	63.9	63 0	63 7	70.9	83 2	64 1	89.7	64 8	73 9	98 0	65 3
Trafficking	60 2	58 7	60 0	61.0	66.7	64.6	65 6	74.1	84 8	66 7	92 2	67 8	75.7	101 1	68 1
Possession and other	23.0	23 0	36.9	22 1	22.0	37 6	20.7	13 1	10 2	12 8	17 1	7 2	11 8	11 3	8 4
Public order offenses	34.3	34 8	21.6	32 4	39.0	23 2	32 7	40.7	28 5	28.7	38 2	14.0	25 3	47 5	15.9
Regulatory offenses	41 9	37 1	34.3	31 6	65.2	41 4	36.3	21 4	37 3	24 8	15.1	17 2	21 3	30 3	15 4
Weapons	39 1	45 6	12 3	48 1	54 6	32 0	50 6	59.5	49 3	36 4	52 1	35 6	35 4	61 0	51 4
Immigration offenses	17 4	16 9	15 9	15 2	17 5	17 9	14 1	19 2	14 2	10 9	8.5	9 4	10 2	18 5	8 4
Tax law violations	17.3	19 6	—	19 3	28.0	—	18 9	26 2	—	40 8	--	—	13 8	—	—
Racketeering and extortion	84 5	74 5	121 5	58.7	53.9	73 0	67 6	79 1	121 3	51 7	50 7	—	48.5	85.7	—
All other	16 2	18.9	22 1	20 2	14.9	23 1	15.0	16 6	21 6	19 2	18 5	17 1	14 4	15.9	24.1

—Too few cases to obtain statistically reliable data

No cases of this type occured in the data

Mr. McCollum. Dr. Kleber.

STATEMENT OF HERBERT D. KLEBER, M.D., EXECUTIVE VICE PRESIDENT AND MEDICAL DIRECTOR, CENTER ON ADDICTION AND SUBSTANCE ABUSE, COLUMBIA UNIVERSITY

Dr. Kleber. Thank you, Mr. Chairman, for inviting me today.

My testimony today arises not from my 2½ years as a policymaker but from my almost 30 years as a scientist and clinician doing treatment and research with heroin and cocaine addicts, mostly at Yale University.

I believe that while the 100-to-1 ratio may be flawed, so is the Sentencing Commission's recommendation of a 1-to-1 ratio. I think somewhere in between may be more realistic. My own suggestion would be at least a 5- or 10-to-1 ratio to recognize the greater dangers that crack brings about.

I would like to start, even though my time has been at Yale and Columbia, with a quote from two of my colleagues from Harvard, Drs. Weiss and Mirin, who wrote a leading textbook on cocaine in 1994, and their statement: "Smoking cocaine seems to lead to addiction more rapidly and more often than using cocaine in other forms."

Another study found that cocaine smokers reported a higher degree of craving for cocaine following drug use than did IV users.

Smoked cocaine hits the brain in less than 20 seconds. That is an incredibly short period of time. Snorted cocaine, the powder, takes at least five times that long to hit the brain.

The blood levels also drop more rapidly after taking it by the smoked form, leading to more frequent use, because euphoria from cocaine use is a function not only of the blood level but of the degree of rise blood level. As the blood levels drop, even though they may still be high, the individual begins to experience anxiety, depression and, dysphoria, leading individuals to want to take another smoke every 15 or 20 minutes.

This combination of very, very short time for onset and very rapid offset helps account for crack's high addictive potential. The aftermath of smoking crack is so intense that individuals do everything possible to try and ward off the aftereffects, leading to use as frequently as every few minutes. This use continues in a binge pattern lasting hours and sometimes days, often halted only when the individual runs out of either money or drug or both.

The body has no natural defenses against the smoked route of intake. When you snort cocaine, you constrict the blood vessels in the nose. That means that as you take more cocaine into the nose, it is harder for it to get absorbed and, as users say, you are simply caking powder up in the nose.

If you shoot cocaine, you have to hit a vein. So unless you put in an IV drip, which most IV users don't do, you have to keep hitting a vein.

But the body has no natural defenses against smoking, so that the individuals can keep on going and going and going for these long binge periods. As they do so, the likelihood of cocaine hallucinations, paranoia and psychosis markedly increases.

The cocaine psychosis is usually preceded by a transitional period where you get suspiciousness, compulsive behavior, depressed

mood. You begin to interpret ordinary events with a degree of suspiciousness. If someone bumps you in the street, you think the person did it on purpose to disrespect you or to challenge you.

So ordinary events take on a heightened degree of reasons for feeling suspicious. When you combine that with the irritability and the aggressiveness the cocaine is producing, you have a perfect scenario for violence.

Certainly you can get this paranoia and violence with any form of cocaine. Cocaine is cocaine. However, the route of administration of crack, the lack of natural defenses that the body has, the ease with which it is used, increases the likelihood that these binge patterns will occur and that the sequelae of suspiciousness, paranoia and violence will occur.

Thus, although crack is usually as expensive as powder by the gram, its sale in small amounts for low prices makes it easier for the poor and the young to initiate and maintain use. It is much easier to afford $5 for a hit than it is $60 for a gram of powder.

This low price also has another feature which I have not heard any of the witnesses talk about this morning, and that is the enormous destabilizing effect that crack has had on predominantly our minority communities. $5 a hit makes anything worth stealing. Having to raise $60 a gram for powder means you are going to try and do bigger robberies. You want to get in more money. At $5, anyone is worth mugging. Anything is worth stealing. And that has an extraordinarily destabilizing effect.

So I would like to conclude by saying I believe that crack is more dangerous than other forms of cocaine and that this danger should be recognized in the way the sentencing occurs, although not by the 100-to-1 ratio.

Mr. MCCOLLUM. Dr. Fagan.

STATEMENT OF JEFFREY FAGAN, PH.D., PROFESSOR OF CRIMINAL JUSTICE, RUTGERS UNIVERSITY, AND VISITING PROFESSOR, SCHOOL OF PUBLIC HEALTH, COLUMBIA UNIVERSITY

Mr. FAGAN. Thank you for inviting me to give my testimony.

Mr. MCCOLLUM. You have to trade microphones. There is no question.

Mr. FAGAN. For over a decade I have done research on drugs and crime and closely studied the cocaine and crack epidemics in the United States going back to the early 1980's. My research on crack cocaine has involved studies and analyses of the effects of criminal sentencing on over 30,000 crack and cocaine offenders over a 10-year period, interviews on the street with over 1,000 users and sellers of crack and other drugs between 1987 and 1990, interviews with over 300 gang members in 1984 and 1985 in Los Angeles, San Diego, and Chicago, and also interviews with 300 women drug sellers in New York over the last 3 years.

My perspective on this is very different, coming from more of a broader, more normative sample than my colleague at Columbia, Dr. Kleber, who tends to see people in treatment. I think the contrast is very interesting from this broader view of a wider range of users, compared to groups that are studied in treatment or in emergency rooms.

The past 30 years have seen three drug epidemics in the urban centers of the United States: a heroin epidemic in the late 1960's and early 1970's, a cocaine epidemic roughly 10 years later that lasted into the early 1980's, and a crack crisis that began in the mid-1980's and peaked just about at the end of the decade. In each of these crises, the focal drug was viewed as a gateway to violence, a gateway to addiction and to a variety of destructive effects on families, communities, and individuals.

In each of these crises, we made, as a society, drug control choices that have taken a deep hold on the legal and social landscape of nearly every segment of American society. These have, without exception, emphasized "legalism" and punishment. Obviously in the past few years much of the concern has focused on the use of crack cocaine. It is worth going into a little bit of the pharmacology of crack for one very small point. Crack is a smokable form of cocaine, as we know; that is, it is prepared from cocaine hydrochloride or cocaine powder. Prior to the advent of crack, however, middle class users had long been aware of the enhanced high from smoking it or freebasing it. But the amount of cocaine necessary for freebasing was out of reach economically to most cocaine users. Accordingly cocaine freebasing was reserved for mostly middle and upper income users or those with access to sufficiently large supplies to sustain a freebase session lasting several hours or perhaps even days.

It is also important to note that during that time cocaine use generally, including freebasing, was an activity largely devoid of violence.

With a price break in cocaine in the 1980's, the raw material for smoking cocaine became widely available as a mass consumer product. Crack cocaine today is simply a poor man's freebase: portable, easy to use and easy to prepare, and far less dangerous in terms of the chemicals involved in its preparation. One need not mess around with ether and have one's face blown off, as happened to Richard Pryor some time ago.

In response to the crack crisis, society mobilized legal institutions in an unprecedented way. I think the results are fairly plain in terms of the mass incarceration that has occurred over the past decade. Several assumptions inform the legislative and judicial perspective that crack was, in fact, worse than other drugs and deserving of these harsher and more criminal punishments. We heard this morning about the putative harm, from Ms. Harris from the Justice Department.

First, increases in homicide and other drug-related violence in the mid-1980's were attributed to crack. The corollary assumption is that crack involvement would lead to an increase in crimes generally, including property crime, to support increased habits.

Second, increases in drug-selling activity were attributed to crack. The emergence of a new generation of drug dealers was attributed to crack, allegedly attracting young men and women from legitimate jobs to the presumably lucrative world of drug selling.

Third, a new generation of criminal justice defendants would be created by their involvement in crack, a generation of individuals who otherwise would have avoided criminal sanctions and the burden of a criminal record.

Fourth, crack was thought to inevitability lead to instant drug addiction, a deterministic assumption. Thus, crack was blamed for the creation of a new generation of drug users who might have otherwise avoided hard drugs.

There are three points that I want to make about these assumptions and the aftermath of the policies. First, from the perspective of a broad population of drug users as opposed to people in clinical treatment, there is very limited scientific evidence to support any of these assumptions that inform the creation of a vast sentencing disparity for crack offenses.

Second, because crack use has been disproportionately concentrated among nonwhite Americans and lacking evidence that crack causes greater harm than other forms of cocaine among the broad user population, the burden of harsher legal responses unfairly falls on African-American and Latino drug users.

Third, the policy itself has failed to achieve its aims and, in fact, has had significant counterproductive effects that have increased rather than reduced the danger to the public.

Let me briefly address each one of these in the interests of time. First, does it increase violence? We found that almost all the crack users, had been violent before they began using crack and remained violent after they began using crack. We found virtually no one who could report initiating violent behavior. We found many reports of people whose violence escalated after they began using crack, but very few who became violent at that point.

Second, we know that homicides did increase during the peak years of the crack epidemic in cities that had big crack problems. However, we also know that homicides increased in cities like Chicago and other cities that did not have crack problems during exactly the same years. If you map the increase of the homicide rates during the 1980's in Chicago with the 1980's in New York City, you will see virtually the same sharp increase in the late 1980's and yet crack didn't hit the streets in Chicago until 1990.

It is probably easiest to say that crack raises the risk of violence, but is hardly a direct cause, and is probably better termed as an indirect cause mediated through a community context. Certainly, it is not a very large causal factor after we control for prior behaviors and neighborhood characteristics.

Second, does crack increase drug selling? Like violence, we found that nearly all the crack sellers we interviewed were veteran drug sellers. We found very few people who entered the business specifically to sell crack. We found that mostly these were people who switched their product lines from powder cocaine to crack.

We also found very weak evidence that people were abandoning legal workplaces for illegal work in crack. Crack sellers were a surplus labor pool in the classic sense: they were out of work for very large periods of time, with very weak work prospects for their futures, very few marketable skills, very little work experience.

Third, with respect to new people getting enmeshed in the criminal justice system, we found very little evidence here also. We found that the percentage of first arrestees among crack offenders was no different than the percentage of first arrestees among cocaine offenders in the early 1980's or heroin offenders in the early 1970's.

We also found that they were no more likely to be young, that is, below 21 years of age, than in previous drug epidemics.

We also found very little evidence that crack led to instant addiction. We asked people specifically the lag time between initiation and when they began using regularly, and the responses were invariably the same: a few weeks, a couple of months. We asked how they had been turned on or initiated; they all told us much the same story, a social initiation through friends and very often through family members.

This leads us to the second point. If it is hard to support the claims of greater harm, what then do we see in terms of the difference between crack and powder cocaine? It is largely a color line. Smoking cocaine in its freebase form is primarily a phenomenon of white Americans who can afford the necessary quantities. Sentences for cocaine users and sellers did not distinguish between smoking, snorting or shooting. Once available in sufficient quantities at a lower price, nonwhite drug users began smoking cocaine in its rock form. It was then that sentences for cocaine possession in its rock form and cocaine selling in its rock form vastly exceeded sentences for cocaine in its powder form. It hard to distinguish what is going on here other than a color line. There is also a class line, but class and race are closely bound up in our society.

Perhaps most important, we found that the effects of these increased sentences and legal penalties were counterdeterrent; that is, table 2 of my testimony shows that the risks of rearrest actually increase with the length of incarceration and sentence. This is true for both cocaine and for crack offenders. Comparing defendants sentenced to incarceration with those sentenced to other forms of punishment, particularly in terms of supervision, the risks of reincarceration were far greater. We found that the costs of incarceration were the exclusion of young people from legal work and the burden of a criminal sentence that endured roughly a decade into the future.

One of my students and I, in writing a paper, said there is an instigative effect from incarceration that actually raises the likelihood of further crime, and that these perversities of sentencing policy actually increase risk to the public rather than control crime. We also found very little evidence of general deterrence, that is, people reporting to us that they would be dissuaded from becoming involved in this business simply because of the threat of greater punishment.

Given these facts, derived from population based research both in the courts and on the streets, we also found that laws that were perceived to be applied unfairly to African-Americans and Hispanics who have disproportionate representation in prisons were actually aggravated by these policies. One of the lessons of three drug epidemics is the limitations on how well legal solutions can solve drug problems that are, in effect, very large-scale social and very large-scale medical problems.

I will stop there.

Mr. McCollum. Thank you.

[The prepared statement of Mr. Fagan follows:]

PREPARED STATEMENT OF JEFFREY FAGAN, PH.D., PROFESSOR OF CRIMINAL JUSTICE, RUTGERS UNIVERSITY, AND VISITING PROFESSOR, SCHOOL OF PUBLIC HEALTH, COLUMBIA UNIVERSITY

Good morning. My name is Jeffrey Fagan. I am a professor of Criminal Justice at Rutgers University in New Jersey, and a Visiting Professor in the School of Public Health at Columbia University in New York City. I am honored to testify regarding the federal sentencing for offenders charged with crime involving crack cocaine.

For over a decade, I have done research on drugs and crime, and I have closely studied the cocaine and crack epidemics in the U.S. since the early 1980s. My research on crack cocaine has involved analyses of the effects of criminal sentences on over 30,000 cocaine and crack offenders over a 10 year period, interviews with over 1,000 users and sellers of crack and other drugs between 1987 and 1990, interviews with 300 gang members in 1984 and 1985 in Los Angeles and Chicago, and interviews with 300 women drug sellers in New York City from 1992 to 1994. Through these studies, I have been able to evaluate the effects of sentencing policy for cocaine and crack offenders, and also the assumptions about these drugs that have informed these policies.

Since the 1880s, social and legal responses to successive drug crises in the U.S. have viewed each new drug as different and more severe than its predecessors. The past 30 years have seen three epidemics in the urban centers of the United States: a heroin epidemic in the late 1960's and 1970's, a cocaine epidemic in the late 1970's and early 1980's, and the crack crisis that began in the mid-1980's and peaked in the late 1980's. In each crisis, the focal drug was viewed as a gateway to violence, addiction, and a variety of destructive effects on families and communities. Throughout this period, drug crises have regularly taken center stage in American politics and crime control policy. During the 1980s, the deepening public anxiety about drug problems led to drug control choices that have taken a deep hold on the legal and social landscape of nearly every segment of American society. From drug testing in schools and the workplace to mass incarceration in the nation's overcrowded prisons, the U.S. has embarked on unprecedented social experiments to control the use of drugs.

The central doctrine in U.S. drug policy during throughout these crises has been "legalism" and punishment. Drug policy has emphasized criminal penalties and deterrence as mechanisms to control drug problems, with prevention and treatment receiving a lower priority and far less funding. In September 1989, in the midst of the crack crisis, the National Drug Control Strategy formalized the nation's policy response to the most recent drug crisis. It called for an "unprecedented" expansion of police, prosecutors, courts, and prisons to "[make] streets safer and drug users more accountable for their actions" ONDCP, p. 24. It also called for stronger punishment for drug offenders, and greater resolve by judges and prosecutors to incarcerate them.

The increased use of criminal justice resources was designed to achieve three interrelated aims: reduce drug demand by deterring would-be users, reduce drug supply by disrupting street level markets, and reduce street violence that is the by-product of illegal drug use. The policy responses required low thresholds for incarceration for violations of drug laws, and a high likelihood of arrest for drug use and sales through extensive street-level enforcement. To accomplish this, resources were skewed from prevention and treatment toward enforcement and incarceration.

Much of this concern was focused on the use of crack cocaine. Crack is a smokeable form of cocaine that is prepared from cocaine hydrochloride, or cocaine powder. It emerged on the streets of Los Angeles in 1984 and in New York and Miami in 1985. Prior to the advent of crack, cocaine users had long been aware of the enhanced high from smoking cocaine, or "freebasing." However, the amounts of cocaine necessary for freebasing were out of reach economically to most cocaine users. Accordingly, freebasing was generally reserved for middle- and upper-income cocaine users, or those with access to sufficiently large supplies to sustain a freebase session lasting several hours or perhaps days. It also is important to note that cocaine use generally, including freebasing, were activities largely devoid of violence.

With the price break in cocaine in the mid-1980's, the raw material for smoking cocaine became widely available as a mass consumer product. Crack simply was "poor man's freebase." It was an ingenious product, easy to make on a stove top from a small and now inexpensive amount of cocaine powder. It was marketed in small doses ($10–$20 per vial), so low-income users could afford purchases. It was highly portable compared to the elaborate and volatile process of freebasing. Its crystalline form conveyed the image of purity compared to the highly diluted and often fake packages of powdered cocaine sold on street corners. The high lasted less than 20 minutes per rock, and users typically made several purchases in order to

sustain their high. Cocaine users had long been aware of the enhanced high from smoking cocaine, so the advent of crack tapped into a mass market with strong demand. Accordingly, crack also presented new opportunities and attractions for drug selling, and an avenue to instant wealth in a context of declining legal work opportunities.

As the crack market expanded and drug problems intensified across the country, legislators everywhere increased the penalties specifically for crack. In New York, penal code definitions and penalties were modified to stiffen punishment for crack possession and sale. Legislators reduced the threshold for felony cocaine possession charge from one-eighth ounce (3.5 grams) to approximately one gram, or six vials of crack.[1] Federal sentencing guidelines mandated significantly longer sentences for crack compared to the amount of powder used to prepare it.

Mandatory terms of incarceration were included in many of these statutes, and the result was mass increases in the numbers of both arrests for drug offenses and prison populations. In California, New York and the federal prison system, drug defendants (primarily arrestees for crack) are now the largest inmate group, both in terms of average daily census and annual prison commitments. According to the Bureau of Justice Statistics, 29.5% of all federal prison admissions in 1992 and 32.1 percent of new state court commitments to prisons were for drug offenses. BJS estimated that the percentage of prison inmates in New York State who were drug offenders rose from 16% in 1987 to 35% in 1992. Table 1 below illustrates these trends.

Table 1: Commitments to New York State Prisons

Year	*1983*	*1985*	*1988*	*1992*
Drug Commitments	1,567	2,218	6,402	11,209
(percent of total)	(12.5%)	(17.9%)	(37.0%)	(44.6%)
Total Commitments	12,537	12,420	17,302	25,153

Source: New York State Department of Corrections, 1993.

Several assumptions informed this legislative and judicial perspective that crack was worse than other drugs and deserving of harsher and more certain criminal punishment. First, increases in homicide and other drug-related violence in the mid-1980's was attributed to crack. Legislators assumed that by controlling crack use and distribution through imprisonment, violence would decline. A corollary assumption is that crack involvement would lead to an increase in crime generally, including property crimes to support increased drug habits. Second, the increase in drug selling was attributed to crack. The emergence of a new generation of drug dealers was attributed to crack, attracting young men and women from legitimate jobs to the presumably lucrative world of drug selling.

Third, a new generation of criminal justice defendants would be created by their involvement in crack, a generation of individuals who otherwise would have avoided criminal sanctions and the burden of a criminal record. Fourth, crack was thought to lead to instant and certain drug addiction. Thus, crack would create a new generation of drug users who otherwise might have avoided "hard drugs." Moreover, the availability of crack would encourage individuals to either bypass the typical "gates" leading to "hard drug use" and begin their drug careers using crack, or encourage drug users to smoke crack rather than snort cocaine powder.

There are three central points that I want to make to the Committee regarding the development of disparately more serious criminal punishments for crack offenses. first, there is no empirical social science evidence to support any of the assumptions that informed the creation of a vast sentencing disparity for crack offenses compared to other cocaine offenses.

Second, because crack use has been disproportionately concentrated among non-white Americans, and lacking evidence that crack causes greater harm than other forms of cocaine, the burden of harsher sentences for crack crimes disproportionately and unfairly falls on African American and Latino drug users. Third, the policy itself has failed to achieve its aims, and has had significant counterproductive

[1] One-eighth ounce of cocaine HCL powder converts to 40–55 vials of crack depending on the size of the rocks and the contents of each vial. Legislators reasoned that possession of six or more vials of crack indicated intent to sell rather than personal use of the drug.

effects that has increased rather than reduced the danger to the public. Let us examine each of these points.

Crack Is Worse? The Assumptions Behind the Sentencing Disparity for Crack Offenses

My research has shown that *none* of these assumptions about crack are valid, and there is no empirical evidence to support policies assigning harsher punishment for crack offenses. I have attached recent research reports that illustrate these points. Let us now examine each assumption.

1. Crack increased violence. Nearly all crack users and sellers, including arrestees, had histories of violence predating their involvement in crack. Many crack users and sellers had no involvement in violence. The frequency of violent acts rose among those already violent, but there was little evidence that individuals became violent after initiating crack use or selling. Homicides increased during the peak years of the crack epidemic. This increase was attributed to the increase in drug selling activity and the competition among drug sellers for turf and profits. However, research in both Los Angeles and New York showed that the percentage of homicides that were drug-related did not increase significantly, and crack homicides replaced cocaine homicides as the primary category of drug homicides. What did increase was gun homicides, but these increased for both drug and non-drug homicides as well.

2. Crack increased drug selling. Many young people became involved in drug selling throughout the 1980s. But research on arrestees and interviews with users and sellers showed that nearly all crack sellers had prior histories of drug selling. The evidence suggests that drug sellers switched to crack selling rather than switching careers from legal pursuits or other forms of crime to drug selling. Newcomers to drug selling were replacements for those who "aged" out of drug selling careers. Two other assumptions about crack are noteworthy. First, tales of legendary wealth accruing to young drug sellers were wildly exaggerated. Drug selling incomes were highly stratified, and the distribution of incomes looks much like other industries: a few people at the top with the highest earnings and many more at the lowest rungs of the wage scale. Second, there was no evidence that crack sellers were abandoning legitimate work for illegal work in drug selling. Few had marketable skills or education, and were unlikely to do well in a declining job market for unskilled workers. This truly is a pool of surplus labor. For them, the choice was not legal versus illegal work, but drug work or other illegal work including crime and "hustling."

3. Crack created new generations of criminal justice defendants and inmates. Analyses of the criminal histories of arrestees showed that the percentage of first arrestees was no greater among crack offenders than among cocaine offenders in the years preceding the crack epidemic. There is no evidence that crack led to new generations of criminal defendants. Most participants in crack use and selling had lengthy prior records including convictions and probation terms. As discussed above, the number of defendants sentenced to prison increased, but this increase was part of a steady trend beginning in the early 1980's toward mandatory prison sentences with longer terms. It also reflects the increases in arrests and mobilization of legal institutions throughout the this period.

4. Crack led to instant addiction. Addiction, defined as semi-weekly or daily use, was no more likely among crack users than among cocaine powder users, heroin users, or users of other illegal drugs. My research examined the length of time from initiation or first use to the start of chronic or daily use. The times were approximately the same for all types of users. Nor was the pathway to addiction any different. Crack use was not the result of street peddlers luring users into trying this new drug. Rather, the social processes of drug use remained almost exactly the same. New crack users were initiated socially, through friends or family members, rather than strangers or drug dealers. This form of diffusion of new drugs into a population is not unlike other social processes of initiation involving alcohol or other drugs. Moreover, there was no evidence in interviews with over 1,000 crack users and sellers that crack was the first or even the second drug in a progression of drugs leading up to crack use. Nearly all had used marijuana and powdered cocaine before using crack. This progression is no different than among users of other illicit drugs.

The Color Line in Cocaine Smoking

The above discussion suggests that what separates crack from other drugs is *not* the assumptions about violence and addiction that have informed sentencing policy for crack offenders. Because of the pricing of cocaine, it had been available in sufficient quantities for smoking primarily to middle- and upper-income people; its price

structure made it unavailable to low-income people. Smoking cocaine in its freebase form was primarily a phenomenon of white Americans who could afford the necessary quantities. Sentences for cocaine users and sellers did not distinguish smoking from snorting or shooting cocaine. Once available in sufficient quantities at a lower price, non-white drug users began smoking cocaine in its "rock" form. It was then that sentences for cocaine possession in its "rock" form vastly exceeded sentences for cocaine in its powder form. Yet millions of Americans continue to smoke freebase cocaine without risking the higher penalties. The line between these two groups is not their involvement in cocaine smoking. Instead, what separates cocaine in its freebase form from cocaine in its rock form is the race, social class and urban location of the users.

The Counterdeterrent Effects of Incarceration for Drug Offenders

Research on the recidivism rates of crack and cocaine offenders sentenced in criminal courts fail to show evidence of deterrent effects of incarceration. I analyzed sentences and recidivism rates of over 23,000 felony drug and non-drug offenders in New York City from 1983 to 1988, and an additional 6,000 offenders sentenced in special "drug courts" designed to expedite case processing. Table 2 shows the relative risks of rearrest, using a Proportional Hazards Model, for the sample of 23,000 defendants sentenced for drug offenses between 1983 and 1988. After controlling for all other offender and offense characteristics, the probability of rearrest increased with the length of the sentence. For example, an increase of six months in the length of an incarceration sentence for a drug offender increases the risk of rearrest by 21.6%.

Moreover, the risks of rearrest are significantly greater for defendants sentenced to incarceration than other forms of punishment. This may, of course, reflect the judicial wisdom to sentence more seriously those offenders more likely to recidivate. But there are two reasons to reject this explanation. First, the very factors that judges key on for sentencing decisions, prior record and crime severity, were controlled statistically in the model. Second, even if such selection factors are evident, statistical analysts agree that these effects are negligible in samples of this size.

An additional cost to this policy is the exclusion of formerly incarcerated young people from legal work. One of the most important policy lessons of the past decade is that incarceration of adolescents for drug offenses relegates them to a lifetime of poor job outcomes and persistent involvement in criminality. Yet the expansion of drug enforcement resulted in an increase in the number of young people incarcerated and spiraling problems of crime and unemployment (See, Richard Freeman, 1992).

Table 2. Observed relative risks of rearrest, by sentence type for 23,000 defendants sentenced in New York City, 1983-88.

Sentence Type	*Relative risks of rearrest Exp(b)*	*Significance p(Wald)*
Probation	.8882	.0092
Time served	1.2656	.0000
1 month incarceration, or less	1.3589	.0000
1 to 2 months incarceration	1.5460	.0000
2 to 3 months incarceration	1.2347	.0006
3 to 4 months incarceration	1.9835	.0000
4 to 5 months incarceration	2.1887	.0000
5 to 6 months incarceration	2.4334	.0093
6 to 9 months incarceration	2.3934	.0000
9 to 12 months incarceration	2.0227	.0010
12 to 24 months incarceration	2.3604	.0000
24 to 48 months incarceration	3.1929	.1476

The evidence of an increase in the risk of rearrest for incarcerated drug offenders is not an isolated finding. The National Research Council's report "Understanding and Preventing Violence" recently concluded that despite the threefold increase in imprisonment over the 1980's, violence rates rose rather than declined. It is one thing for rates to neither decline nor remain stable, and quite another for these rates to increase. I also found this increase for non-drug offenders as well, again after controlling for offense and offender characteristics. This suggests that there is an iatrogenic, or instigative, quality to incarceration that raises the likelihood of fur-

ther crime. These perverse effects of sentencing policy increase the risks to the public rather than control them. That they carry enormous fiscal burdens borne by every citizen further darkens this picture.

This does not suggest that incarceration itself should be rejected. The lesson of these studies is that longer terms of incarceration do not necessarily achieve their desired results, and may actually do far more harm than good. Moreover, these laws are perceived as being unfairly applied by African Americans and Hispanics whose disproportionate representation in U.S. prisons has been aggravated by these policies. The ineffective and disparate sentence lengths for crack users, who primarily are non-white, risks the loss of public confidence in the essential fairness of laws that are perceived as discriminatory and whose benefits are difficult to discern.

Lessons From Three Epidemics

Current federal sentencing policy has been made in an atmosphere of intense concern but without careful conceptual development or evaluation of its underlying assumptions. We have yet to measure the consequences and returns from the sentencing policies that have increased our reliance on incarceration to control drug problems, and to assign longer sentences to offenders involved with crack cocaine. Today, an opportunity exists for such an evaluation and rethinking of these policy choices. Like the epidemics that preceded it, the crack epidemic has run its natural course. The crisis that accompanied the onset and peak of the crack epidemic has subsided, although significant drug problems remain.[2] There is now empirical information and rational perspective on many of the policy initiatives undertaken during the mobilization of the past decade, and also lessons to be learned from earlier drug crises. This allows us to highlight those policies with promise, and those whose limits were quickly reached. It also provides a context in which to formulate a coherent drug policy framework where specific initiatives make sense, and where policies can synergistically achieve meaningful reductions in drug problems.

First, the experiment of mass incarceration over the past decade suggests the limits of the possibilities of deterrence based strategies for controlling large-scale drug problems. The sharp increases in incarceration rates have had limited success in reducing the use or availability of drugs. The use of precious criminal justice resources has not brought returns from either market disruption or demand reduction. The lesson of the past decade is in recognizing the limits of legal institutions and the criminal justice systems in dealing with drug use. Epidemics such as the recent cocaine, crack and heroin epidemics suggest that societal drug problems occur on a scale that exceeds the limited capacity of the criminal justice system. To mobilize legal institutions on a scale that would match these drug crises is not practical in a complex society with multiple policy demands and declining economic resources. It also raises problems for the consensus on law and the importance of fairness.

Second, recurrent drug problems place extraordinary burdens on police, courts and communities. During the 1980s, police efforts were skewed toward mass arrests and created organizational burdens to sustain them. Police corruption from drug enforcement became a recurring management problem that threatened morale and public confidence in the police. The quality of justice in the courts was compromised by the crush of caseloads and the pressures to move calendars. Prisons suffered in two ways: overcrowding, and the emergence of a new generation of inmates that posed challenges for prison management and security.[3] Although communities de-

[2] A core of high rate cocaine and crack users remains active, while the prevalence of causal hard drug use has declined. Drug use declined dramatically in the 1980s, according to the National Institute on Drug Abuse. The number of users of any illegal drug dropped by 37%, from 23 million in 1985 to 14 million by 1988. The FBI's Uniform Crime Reports show that homicides, many of them related to drug transactions, peaked in 1991 but have declined steadily since then. However, the percentage of arrestees testing positive for cocaine or heroin has remained steady at the high rates first reached in the mid-1980s. At the same time, the high rates of lethal violence that accompanied the emergence of crack markets a decade ago have now subsided. There are indications of the re-emergence of heroin a popular addictive drug, but the prevalence of heroin among arrestees and in emergency room admissions remains low compared to cocaine. Rates of marijuana use among adolescents have increased slightly since their lowest points in the mid-1980s, while alcohol remains the most persistent problem among psychoactive substances for both adults and adolescents. (National Institute on Drug Abuse, 1994). For further information, see: Zimring and Hawkins (1992), and Kleiman (1992).

[3] Many policies actually worsened the problems they intended to solve. For example, over half the admissions to California prisons in 1988 were technical parole violations of parolees who tested positive for illegal drugs. Formal punishments were limited to incarceration or virtually nothing, as the public demanded (and got) the most extreme forms of punishment for drug offenders. As a result the availability of treatment and rigorous forms of community supervision declined as funds shifted toward case processing and incarceration of drug offenders.

manded increased enforcement to rid them of drug dealers, many residents resented what they perceived as the aggressive enforcement of unfair laws that were disproportionately targeted at minority citizens. These policies served to increase disrespect for, and resistance to, the law among many citizens. Judges resisted mandatory sentencing statutes that stripped them of their discretion in sentencing, further undermining public confidence in the same laws that drug policy was trying to reinforce.

Third, drug policy is further challenged by its interdependency with health, crime control, and other social policies. Drug policy often has a push-down-pop-up effect: the more we put pressure in one place, the more likely we are to experience new problems in another. Thus, for example, as we continue to prohibit the distribution of clean syringes, we increase the health risks of HIV transmission among intravenous heroin and cocaine users. Or, criminal sanctions for low-level crack dealers focus resources away from treatment of crack and cocaine users whose behaviors are vectors for HIV transmission through high-risk sexual activity. Or, successful interdiction of marijuana imports encourages domestic growers to develop higher potency crops that pose significantly greater health threats.[4]

In sum, the lessons from three decades of legalistic drug policies suggests deterrence strategies have not been successful in reducing drug use. In fact, their adverse effects have intensified certain health and social risks of drug use. There is little evidence of either general or specific deterrent effects, mitigating whatever benefits there may be from the harsher sentencing of crack offenders. Enforcement strategies have consumed resources, aggravated the health risks associated with drugs, and increased the levels of violence surrounding drug markets. The application of severe sentencing laws with a broad and nondiscriminating reach have undermined rather than reinforced the moral authority of the law, among many citizens and judges.

In sum, there is no scientific or practical basis for sentencing policies that increase penalties for crack use or sales above those for other forms of cocaine. There is no net benefit in terms of public safety or reduction in the scope and severity of drug problems. There is no net benefit in reductions in violence or other crimes. There is no net benefit in increasing public confidence in the law or in society's legal institutions. The fiscal costs are enormous, and the allocation of scarce public resources toward this failed policy is no longer justifiable.

Mr. MCCOLLUM. Mr. Nelson.

STATEMENT OF TIM NELSON, SPECIAL AGENT, NORTH CAROLINA STATE BUREAU OF INVESTIGATION, AND VICE CHAIRMAN, NORTH CAROLINA NARCOTIC ENFORCEMENT ASSOCIATION

Mr. NELSON. Thank you, Mr. Chairman. I want to thank you and other members of this subcommittee for the opportunity to appear here today on this important issue. I consider it a pleasure and an honor to be here.

Although I am a State agent from North Carolina, I appear today on behalf of the National Narcotic Officers Association Coalition. The coalition was formed in August 1994, and one of our primary objectives is to impact legislation affecting narcotic law enforcement in the United States. Our membership consists of 21 Federal, State, and local associations representing over 25,000 narcotic officers across the country. Our executive board and other delegates recently met and voted to oppose any efforts to amend the existing Sentencing Guidelines regarding convictions for crack cocaine.

I offer the following document into the record on behalf of the coalition. Mr. Chairman. I will read portions of that.

Mr. MCCOLLUM. Please do.

[4] According to Mark Kleiman of the Kennedy School at Harvard, it is not clear whether the carcinogens in the domestic crop are greater than in the imports. However, head shop bans have shifted smoking from products using water filtration to rolled joints. But water dissolved most of the carcinogenic material from marijuana cigarettes, material that is ingested in its rolled form. See Kleiman (1992).

Mr. NELSON. I am writing on behalf of more than 25,000 Federal, State, and local narcotic enforcement officers. These officers are members of the constituent associations of the National Narcotic Officers' Associations Coalition. You may recall that our coalition was formed as a direct result of efforts to reduce funding to the Edward Byrne Memorial State and Local Law Enforcement Formula Grant Program last year. These officers are deeply troubled by the U.S. Sentencing Commission's proposed amendments to the Federal Sentencing Guidelines, specifically those dealing with crack cocaine.

As I am sure you are aware, the Sentencing Guidelines now provide a more harsh penalty for those involved in processing and distributing crack cocaine as opposed to powder cocaine. This variance is entirely appropriate, based not only upon the pharmacological differences between the substances, but also upon the greater societal threat imposed by crack cocaine. Violence and street crimes are unfortunately directly associated with crack cocaine. Crack's significantly greater addictive character poses a direct threat to our Nation's youth. Regrettably, those least able to resist the threat, inner-city youths, are most often the target of cocaine traffickers. Street-level crack dealers who are members of trafficking organizations are often targeted by narcotic task forces and municipal enforcement agencies. These dealers, once arrested, can be valuable assets to investigations directed against higher-echelon distributors and organizers. The key is obtaining their cooperation.

Enhanced sentencing possibilities under the current guidelines caused those charged with crack cocaine violations to carefully consider whether they wish to cooperate with authorities in return for sentencing reductions. We consider this factor an invaluable tool in our enforcement efforts. Current guidelines offer appropriate sentencing incentives to defendants who cooperate with law enforcement officers. Dilution of the penalties will invariably diminish the value of incentives to cooperate.

The Nation itself is being ravaged by crack cocaine and crime that is associated with it. Congress must ensure that the crack cocaine guidelines remain high and apart from powder cocaine to ensure that those responsible for distributing crack to our youth and for violence on our streets are punished appropriately. Many of our finest citizens who live in neighborhoods and communities ravaged by crack cocaine tell us they support harsh penalties for those persons engaged in the sale and distribution of crack cocaine.

After reviewing the study by the Sentencing Commission, it appears the Commission had concerns that existing guidelines may be discriminatory toward black citizens. Many black leaders recognize that the black communities are the communities of our Nation suffering the most from crime and violence associated with crack cocaine.

Our coalition views the proposed amendments, which seek to quantitatively equalize punishment for powder and crack cocaine by weakening the crack guidelines, as a dangerous threat in our counterdrug efforts. This is simply the wrong message to send at the wrong time. Even assuming arguendo that equal protection concerns demand equalization, then the relative punishment for powder cocaine should be raised to those for crack, not vice versa.

Again, the coalition joins with other professional law enforcement associations in urging Congress to strongly consider not making any changes in the Federal guidelines relating to powder and crack cocaine.

That concludes the substance of the document. I have a few more comments.

For the past 6 years I have commanded a multijurisdictional task force which has been engaged primarily in the dismantling of major drug distribution organizations in eastern North Carolina. We have found, in many cases, because most of our cases go through the Federal system, that the leverage created by the harsh penalties is indeed an invaluable tool to us in order to—especially in a major conspiracy investigation, to go from the actual people distributing the drugs on the street to successfully convict the top-level people in these conspiracy organizations.

When a person is arrested in North Carolina, and I suspect in many other States, they want to know immediately if they are going to Federal court. People dealing crack on the streets are very aware of the harsher penalties associated with crack cocaine in the Federal system. Their fear of being convicted and receiving a lengthy sentence is the single most important factor causing their cooperation. I emphasize that the existing penalties are an invaluable tool to narcotic law enforcement and the successful conclusion of these types of investigations.

It is also very important to note that the cooperation extends into other crimes as well. We have had defendants who not only testified against their coconspirators, but also gave us information resulting in convictions in homicides, bank robberies, et cetera. The coalition would strongly urge Congress to maintain these existing Sentencing Guidelines.

Thank you.

Mr. MCCOLLUM. Thank you very much, Mr. Nelson.

[The prepared statement of Mr. Nelson follows:]

PREPARED STATEMENT OF TIM NELSON, SPECIAL AGENT, NORTH CAROLINA STATE BUREAU OF INVESTIGATION, AND VICE CHAIRMAN, NORTH CAROLINA NARCOTIC ENFORCEMENT ASSOCIATION

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After reviewing the study by the Sentencing Commission, it appears the Commission had concerns that existing guidelines may be discriminatory toward black citizens. Many black leaders recognize that the black communities are the communities of our nation suffering the most from the crime and violence associated with crack cocaine.

Our Coalition views the proposed amendments, which seek to quantitively equalize punishment for powder and crack cocaine by weakening the crack guidelines, as a dangerous retreat in our counter-drug efforts. This is simply the wrong message to send at the wrong time. Even assuming arguendo that equal protection concerns demand equalization, then the relative punishment for powder cocaine should be raised to those for crack, not vice versa.

Again, we, the National Narcotics Officers' Associations Coalition, join with other professional law enforcement associations in urging Congress to strongly consider not making any changes in federal guidelines relating to powder and crack cocaine. The Coalition would like to be part of any hearings related to this matter. Should that be possible, please contact me at 919–355–6805 to arrange for witnesses.

Thank you for your consideration and continued support of law enforcement and we hope to work with you on this and other issues in the future.

Mr. MCCOLLUM. We are having a quorum call now that will be followed 8 minutes after by a vote on some proposal. I do not intend to break to go to the quorum call. I don't find a need to do that. Some of my colleagues may. I would like to continue this hearing.

I want to ask Dr. Curry to testify, and with any luck, if Mr. Scott or Mr. Conyers can assist me in this, we will try to get you out at a reasonable hour. I know a number of you have planes to make.

Dr. Curry, please proceed.

STATEMENT OF ARTHUR CURRY

Mr. CURRY. Thank you, Mr. Chairman and members of the committee. I am here to put a face behind the sentencing.

I think it is critical that you understand the significance of why I am not here. It is not my intent to point fingers or criticize judges or prosecutors or mock the judiciary system of our country. My sole purpose today is to present my son's case to you as an example of why we must rethink the 1986 Anti-Drug Abuse Act in general and specifically the disparity that exists between powdered and crack cocaine sentencing.

In passing this act, we have forced prosecutors to demonstrate their toughness on drugs and drug and drug offenders by the number of convictions they get. This has meant, in many cases, referring cases normally heard in State courts to Federal courts, changing the venue of location for conviction and using minor participants that undercover capacity relative to other criminal activities that are taking place.

I must admit that I am sometimes frustrated and angered by a democratic system that I defended and promoted as a soldier in

Vietnam, as an educator, as a parent and as a black male in America. I was raised to believe that this system worked for everyone, regardless of race, gender, age, or religion. Now I see this very system dealing inequitably with young black men, my son being one of them.

My son, Derrick A. Curry was arrested on December 5, 1990, at the age of 19 and charged with one count of possession with intent to distribute crack cocaine, one count of distribution of crack cocaine and a conspiracy count. He is the youngest of three children in my family and my only son. His oldest sister is an accountant and his other sister is a recent graduate of Carnegie-Mellon in Pittsburgh.

A complete background check was done by the FBI and no evidence was found to support any contention that he was a major drug dealer. He owned no automobile; he drove an old Chevy Citation that belonged to his mother. He had no money and like most college students routinely borrowed money for gas from his mother and me. He had no jewelry, no prior arrest records nor any involvement with the law prior to this particular incident. He had not been suspended from school in his entire school career. On the other hand, despite having an IQ of 80, he was in his second year at Prince George's Community College, working toward, of all things, a degree in criminal justice over a 5-year period.

The FBI had conducted an investigation involving 28 individuals for over 5 years. By the prosecutor's's own records, my son was determined to be a minor participant who was only involved in the final 6 months of the investigation. During the ensuing months, he was offered a plea agreement which called for him to plead guilty to the conspiracy count and agreed to work undercover in the Metropolitan D.C. area in connection with other criminal investigations in exchange for a 15-year sentence. My son turned down that plea agreement for two reasons. First, he did not feel that he was guilty and secondly, did not wish to work undercover.

Federal prosecutor Jay Apperson in his commentary "What Prosecutors Know: Mandatory Minimums Work," Washington Post, February 27, 1994, best describes the subjective practices that exist when comparing Angela Lewis' case with my son Derrick. Lewis was sentenced to 10 years for her involvement in drug trafficking when she refused to cooperate with the authorities. After deciding to cooperate, she was given only an 18-month sentence.

Derrick was offered a chance to cooperate with the prosecutors, not in exchange for 18 months, but in exchange for 15 years and do undercover. Does fairness, justice and equality of the law depend solely on the prosecutor one receives? Does cooperation lead to the truth or does it merely encourage saying anything to please the prosecutors to receive a reduced sentence?

Because of the large number of individuals involved in this legal case, Derrick was tried individually. He also was the only one of the 28 original defendants who was found guilty of the conspiracy. One cannot help but wonder with whom did he conspire?

Derrick was sentenced on October 1, 1993, to 19 years and 7 months. He is not eligible for parole. He will be 40 years old when he is released.

I must admit to you that I too sat and watched former President Bush address the Nation on the drug problem. Without the facts, I too believed that crack was the worst evil to confront our Nation—that something had to be done. Now we have the facts and something still must be done. With the facts, how can the penalty for crack be 100 times greater than that of powder cocaine, especially when the disparity so negatively impacts black youth. We need only to visit any prison to see for yourself the next generation of young black males locked behind bars.

In an effort to convince you to eliminate the disparity between "powdered" and "crack" cocaine, I wish to offer the following:

Is the penalty greater for killing someone with a handgun or shotgun?

Is the penalty greater for killing someone with a gun as opposed to a knife?

Is the penalty for bombing a building dependent upon the type of explosive used?

Is the penalty greater for vehicular manslaughter when one is intoxicated with beer rather than whiskey?

How would you react to a law when vehicular manslaughter was punishable 100 times greater if you were intoxicated on martinis?

This is perhaps the heart of the matter. Martinis is to powder cocaine as "rot gut" whiskey is to crack. It is a matter of affordability, of economics, of rich versus poor. We will rarely punish the true kingpin, given the existing laws.

My son will spend roughly as long in prison as he has been alive. Such a sentence for a first-time, nonviolent offender is astounding, not because it is unusual, but because by any standards, it is incomprehensibly severe.

It is nearly three times the prison sentence served by most murderers in this country.

It is four times the prison sentence served by most kidnappers. It is five times the prison sentence served by most rapists.

It is 10 times the prison sentence served by those who illegally possess guns.

As previously stated, my son was sentenced to 19 years, 7 months as a first-time nonviolent minor offender. If he had been convicted of the same charges for powder cocaine his present sentence would have been 5 to 6 years, a 14-year difference in sentencing. That is a lifetime for a young man.

Mr. Chairman, I am as conservative and as Republican as most Republicans. However, I cannot support this grave injustice. My entire career has been devoted to law and order, but I have always insisted that had the punishment fit the crime.

I thank you for this opportunity to speak before you this afternoon, and I remain hopeful that crack and powder cocaine will be sentenced on a 1-to-1 ratio and that it be made retroactive. I ask this not necessarily for my son, but for the justice and equality of all young people.

Thank you.

Mr. McCollum. Thank you, Dr. Curry.

We have bookends, yours being poignant and personal, and Judge Strom's being from the bench's perspective of obvious cases, where I think most of us, hearing the facts that were presented,

would have said the end result was not right; and knowing that, but also knowing there is some merit to the arguments that have been made—I think to some extent by Mr. Cullen today and Mr. Nelson from a law enforcement and prosecutor's perspective.

I would like to turn first to Mr. Cullen and ask you if you could respond to Dr. Curry's situation? I am sure there could be an argument made, as tragic as the facts, assuming everything Dr. Curry said. And I am sure there are other cases like his son's—maybe more than we would like to admit—where you could argue that the price that is being paid by his son is necessary to deterrence or to some other ultimate cause, but I would suspect that, more likely, you would think that there is something maybe in the system, even if you want to protect it to a certain extent, that needs some adjustment.

How would you react—how should I react to this as I listen to it, from a prosecutor's perspective?

Mr. CULLEN. I would say that my heart goes out to any parent who has a son or daughter who gets in trouble, but reducing the sentence for young Mr. Curry or any other individual in the future who traffics in crack cocaine will lead to more victims not less victims. It will lead to a greater problem for all Americans, but particularly for African-Americans in the inner city than it will do to help them.

As a prosecutor, I never heard anyone ask me to be lenient and to reduce the penalty or to seek reduction in the penalty. Most of the reasons that we prosecuted cases in Federal court of what should be traditional State court prosecutions were because the leadership of the city of Richmond, which was inner-city, African-American leadership, asked us to do it in the Federal court.

Mr. MCCOLLUM. But don't you think that the kind of situation described by Dr. Curry, the prosecutorial discretion being used here, was abuse of that discretion, seeking that high a penalty for noncooperation, vis-a-vis other experiences that I have heard about and I am sure you must have had?

Mr. CULLEN. I don't know the facts of Dr. Curry's case, but it sounded to me like the offer was 15 years, and his son is serving 19 years. So, to me, there was not much abuse of discretion there. If the guideline said his sentence was supposed to be 19 years, 7 months, and he is serving 15 years, that seems an appropriate offer made to him to cooperate.

Mr. MCCOLLUM. A broader question. We have had testimony today earlier from the Sentencing Commission and from Ms. Harris, Assistant Attorney General for the Criminal Division, that with respect to use as opposed to distribution, that there was no dispute among any of them that we ought to go to a 1-to-1 ratio.

Isolating it to use, do any of this panel's membership believe that with respect to use or simple possession we should keep a differential between crack and powder—just use or possession, rather than distribution or sale?

Mr. CULLEN. I think, and I would like to hear from the physicians or those who know the chemical, but it is a worse thing for society to be possessing and using crack cocaine than it is powder-based, based on what happens and the repetition and the theft and

the violence to continue that habit. I do not think, however, that 100-to-1 is the right ratio for mere possession.

But I dare to say that I can remember no instance, as a Federal prosecutor, where we prosecuted someone who only possessed either a small amount of crack or a small amount of cocaine. It is not being prosecuted federally. I submit there is no problem in the Federal system anywhere of people being prosecuted federally for just possession.

Mr. MCCOLLUM. Then there would be no problem with our adjusting it, either?

Mr. CULLEN. I concede that.

Mr. MCCOLLUM. Do you, Mr. Nelson?

Mr. NELSON. I don't see any recreational use of crack because of its highly addictive nature. As young people begin to experiment with crack cocaine, the next thing, they are using it frequently; and then they end up selling it in order to support their own habit. So it is a vicious cycle that undermines society across the board.

Judge STROM. My response to that is that every case that is prosecuted in the Federal courts is prosecuted under 841, possession with intent to use or distribute, and they rely upon amounts of cocaine even though there is no proof or showing of actual distribution.

The testimony is presented that when you possess, for example, 10 or 15 grams of crack cocaine, then you must be a distributor because nobody would just possess that amount for their own use. The cases are not prosecuted as use or possession. If it were just use or possession, it goes to State court and most of those people go on probation. The system is really unfair in that respect, because I don't believe that you can justify treating it other than one-on-one for base-offense level.

Mr. MCCOLLUM. Some of you have said one-on-one is essential, and I got that picture, but we have had variations on this, too. We have had a number of people say that something less than 100-to-1 would be the appropriate thing to go to on distribution as well. I wonder where each of you is.

Let me go from left to right. Let's distinguish maybe use and distribution, but distribution seems to be the primary focal point. Judge, you would insist that one-on-one for the base is critical, not some other in-between——

Judge STROM. That may be too strong a statement. It seems to me that the problems that we have with crack cocaine are treated with the adjustments, but the substance is the same. We don't distinguish in other drugs in any way, only in cocaine, and yet we know it is the same drug, just a different form.

It seems to me that common sense makes it 1-to-1.

Mr. MCCOLLUM. Mr. Cullen, 100-to-1?

Mr. CULLEN. I don't like the "1." I think if there is a policy flaw in the country today it is the casual user who thinks that there is no victim, that his weekend recreational use is hurting no one, that the Congress should address, making sure that those people who, I believe statistics will show, by and large, are the huge demand for drugs. The huge demand doesn't come from the African-American in the inner city, but from the white guy with the briefcase. Those people are the ones getting away with murder, and I would

like to see an increase in the penalties for the casual—so-called "casual" cocaine user.

Mr. MCCOLLUM. You wouldn't reduce any of it, though? You would leave it at the high level it is today for crack?

Mr. CULLEN. No, I think there can be a compromise on the 100 side, but only if you do not take away from law enforcement the ability to leverage the low and middle level members of the gangs to cooperate. They won't cooperate, like Dr. Curry's son, because there is nothing in it for them to do. If you don't take that incentive, you are not going to take out the gang.

Mr. MCCOLLUM. Dr. McDonald, we have you doing the studies. Now I am getting you into the opinion business.

Mr. MCDONALD. Speaking only as John Q. Citizen, having no other authority, I am actually persuaded by the Sentencing Commission's recommendations. I also am curious as to why the law enforcement folks here feel that their hands would be weaker with the current sentences for powdered cocaine, which are actually very high.

Mr. MCCOLLUM. I will come back and let—you ask that in a minute maybe, but I want to move quickly down the line.

Dr. Kleber.

Dr. KLEBER. I believe that there should be marked differences between the sale of crack and the sale of powder, but I don't think that should apply to the individual caught with simple possession. I think that the sentencing there should be basically the same for powder as for crack.

Mr. MCCOLLUM. But on the sale and distribution you wouldn't think it has to be 100-to-1?

Dr. KLEBER. As I testified, I think it should be different. I would see 5- or 10-to-1 as more reasonable.

Mr. FAGAN. I am persuaded by the arguments of the Sentencing Commission. Among other reasons, the law itself which distinguishes between crack and powder is a law that is very difficult to enforce. A distributor is likely to carry large amounts of cocaine powder to avoid harsher crack penalties, this assumes that people understand the law and they think about the legal threats rationally. A dealer would be very likely to just carry powder, knowing it would carry a lesser penalty. There is really no comparative advantage to the current structure of the law and it is impossible to distinguish the intent of the person with respect to whether they intend to sell powder or rock cocaine.

Mr. NELSON. Mr. Chairman, I have not spoken or heard from anyone in narcotic enforcement that would support any changes in the existing guidelines. As a matter of fact, Congressman Schiff had a point, well taken this morning, we have not heard much about, but if we make any changes to equalize things, we should increase the penalties for powder cocaine.

Mr. CURRY. I am persuaded by the argument from the Sentencing Commission also. I think that when we start to single out simple possession with possession with intent to distribute, we need to define carefully what amounts we are talking about, because that can be a catchall kind of a situation.

My son did not cooperate, but I want it to be a part of the record that the prosecutor admitted he didn't have any information to give

the first time. He knew absolutely nothing. He was doing a dumb favor as dumb teenagers sometimes do for a friend, and he got burned, and he got burned well.

Mr. McCollum. Part of this may be the law, part sounds like a prosecutor that abused his discretion, Dr. Curry.

Mr. Scott.

Mr. Scott. I yield to Mr. Conyers.

Mr. McCollum. He is the full ranking minority member of the full committee, so we show a little deference, especially when our senior subcommittee member on that side of the aisle wants to do it.

Mr. Conyers. Thank you, Mr. Chairman. As young as I look, I carry the burden as the old senior man on the Judiciary Committee. But I am appreciative.

Let me raise this question as constructively as I can: How can we develop a strategy—let's take the law enforcement types out of this for awhile, but let's think about the testimony from the Department of Justice. And what I am thinking, Dr. Fagan, is that if the Department of Justice had come out on the side of the Sentencing Commission, I think that the likelihood of us working toward this objective, which has been hanging out here for the longest—I mean, our files are getting pretty replete with the Curry-type cases and the problems that this discrepancy has engendered—congressionally inspired to be sure.

Was there anything that the young lady from the Department of Justice said in her testimony that would give an idea or give you some reason that might give us the basis for a strategy for moving this—these two sentences toward some closer proximity?

Mr. Fagan. That is a difficult question. Much of the basis by the representative of the Justice Department for maintaining the disparity between crack and cocaine sentences and trafficking was attributed to the greater harm that accrues from trafficking in crack and the greater harm that accrues from the substance itself. The data that supports the contention of the greater harm is in dispute.

My colleague, Dr. Kleber, and I disagree on this for reasons that have to do with our disciplines and our approaches. Much of the data that does exist is an accumulation of perceptions and information that comes from individual cases, rather than from a broader look at trends over time. Systematic social science information, has not been forthcoming.

I was taken this morning by comments from Mr. Schiff about how hard it is, in his mind, to study illegal behavior, and that because it is so hard to study it, we can't trust the data anyway. Well, I don't think that drug use and trafficking are all that hard to study. I have been able to do it with some regularity for almost 20 years, and mainly through face-to-face interviews.

Quite honestly, and I am being pessimistic, I did not hear any basis for reconciliation between the problems that exist within the implementation of the law, the structure of the law itself, and the positions articulated by the Justice Department.

Mr. Conyers. Well, we are all adults here, so we understand that the political mood of an angry Congress or angry lawmakers, which has been going on for some time—it didn't just start with this—the recent decades of adding on punishments and maximums

and death penalties and more prisons is a whole political style of approaching criminal justice in America. And there are those that are attached to that point of view and, regardless of the results, don't seem to plan to change it too much.

Mr. FAGAN. I would think one thing that might be stated would be to say that the laws are not working, and that is a message that needs to get out. Despite the efforts of law enforcement, which are noble and heroic, it is not working.

As the National Research Council reported in the Violence Panel Report in 1993, we tripled between 1980 and 1990 the length of time that violent offenders are sentenced to prison. Did the rates of violence go down during that period of time? No. Did they remain stable? No. They, in fact, increased.

It is one thing if they didn't go up; it is quite another to say, my goodness, they increased. That, in itself, should be quite alarming, and should also signal the failure of the policy. I don't believe that there are any data to suggest that incarcerating an offender, certainly not in our data, and certainly not in other data sets—incarcerating offenders either has a specific deterrent effect on that individual or a general deterrent effect on the individual who lives next door to him or her. That is the message that I think has to begin the conversation, leading to a changed conversation. I am not sure I would continue the same conversation—for every story about lack of harm, there is another story about how harmful it really is.

The issue, I think, is a dollars-and-cents issue. We are overcrowding our prisons. We are alienating large segments of the population. Current law and policy are not working. We are implementing laws that are very difficult to enforce. There have to be some other ways, and I think that is the nature of the conversation that needs to occur.

Mr. CONYERS. If the chairman——

Mr. MCCOLLUM. I will permit—I was lenient with myself; I will be lenient with you.

Mr. CONYERS. I wanted to see if Dr. Curry had any reflections on the conversation I had with Dr. Fagan.

Mr. CURRY. No. We must understand that people do make dumb mistakes and when they do, yes, punish them. But don't take their life away. That is what I don't understand.

My son should—is being punished, but not for 19 years, 7 months, because of one dumb thing that he did as a 19-year-old. Give him a chance to demonstrate that he has learned from his mistake and that he can go on. I know pretty much what I sent to prison; I don't know what I might get back in 19 years, 7 months.

Mr. CONYERS. Are there any groups that work together—do you have other parents or know of others that have been put into similar circumstances by this disparity in sentencing?

Mr. CURRY. There are others, yes.

Mr. CONYERS. Mr. Chairman, Rev. Jesse Jackson has been inveighing with me on this subject for many years, and I would like, if it is possible, that at one of our hearings that we would include him in for his comments and discussion.

Mr. MCCOLLUM. If we have the opportunity to have a setting where that is appropriate, or can arrange it so it works, I would

be happy to. You weren't here earlier, but we are going to have—of course, we have Waco hearings coming up but we have to act on the Sentencing Commission Guidelines rather expeditiously because of when they go into effect. If you would suggest to him that he could at least submit written testimony, we would love to take it. We may be able to get him in in person. I don't have a current hearing——

Mr. CONYERS. That is a good start in the discussion. But, you know, Jesse Jackson on paper and Jesse Jackson in person are completely different.

Mr. MCCOLLUM. If we had had the suggestion from you a couple of days ago, we would have had him here today. There is no objection to his coming. I am not certain that I can commit to a schedule of that, but I am not foreclosing it either.

Mr. CONYERS. You certainly haven't, and I appreciate that. Thank you. You remembered that you are talking to the senior member on the Judiciary Committee.

I am delighted to have had this conversation with you. Thank you very much.

Mr. MCCOLLUM. Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I ask unanimous consent that the statement of Mr. William B. Moffitt of the National Association of Criminal Defense Lawyers be admitted into the record.

Mr. MCCOLLUM. So done, without objection.

Mr. SCOTT. Thank you.

[The prepared statement of Mr. Moffitt follows:]

PREPARED STATEMENT OF WILLIAM B. MOFFITT, TREASURER, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

By way of introduction, I am a practicing attorney of twenty years. My practice is dedicated to representing citizens accused of crime in our society. I am currently the Treasurer of the National Association of Criminal Defense Lawyers (NACDL). As such, I have been asked on behalf of the NACDL to provide written comments to the Subcommittee concerning the sentencing disparity between a cocaine substance which has come to be called crack, and all other forms of the substance cocaine. Finally, as this is written testimony and I will not be appearing before you, I think it is important for you to know that I am an African American.

PROFESSED CONGRESSIONAL GOAL: A RACE NEUTRAL SENTENCING REGIME

As you know, since the advent of the sentencing guidelines, the length of an individual sentence is tied directly to the weight of the controlled substance involved in the crime: the lower the weight the shorter the sentence; the higher the weight the longer the sentence. The stated goal of Congress in establishing the United States Sentencing Commission and providing for the promulgation of sentencing guidelines was to avoid *"unwarranted sentencing disparities among defendants similarly situated."* 28 U.S.C. 991(b)(1)(B) (emphasis added). Accordingly, the Commission was charged by Congress to "assure that the guidelines and policy statements are entirely neutral as to race, sex, national origin, creed and socioeconomic status of offenders." 28 U.S.C. 994(d). The sentencing guidelines declare that race and socioeconomic status are irrelevant in the determination of a federal sentence. U.S.S.G. 6 5H.10. The existence of a 100:1 ratio between the weight of crack cocaine and all other forms of cocaine renders the promise of Congress and the Sentencing Commission, to establish and maintain a race neutral sentencing regime, but a cruel hoax.[1]

[1] It is important to note that the current cocaine sentencing regime of the 100:1 ratio extends not only to crack versus *powdered* cocaine, but to crack versus *any other form of the drug cocaine—even other smokable forms* (e.g., freebase). Amendment 15 to U.S.S.G. §2D1.1(c)(Drug Quantity Table) states: "'Cocaine Base,' for the purposes of this guideline means 'crack.'" "'Crack'" is the street name for a form of cocaine base usually prepared by processing cocaine

II. "Harm" as Hoax

Among the "reasons" cited by the proponents of the current sentencing disparity between crack and all other forms of cocaine is the "harm" attendant to smoking cocaine. But the specialist United States Sentencing Commission, in its comprehensive 242 page report to Congress, demonstrates that all "assumptions" about crack's increased harm are flawed and empty. *See generally* Attachment A, NACDL's Written Comments Regarding the Commission's February 1995 Report to Congress on the Current 100–1 Federal Sentencing Disparity Between "Crack" and Powder Cocaine Offenses (hereinafter, Attachment A, NACDL Comments to Commission). For example, as the Commission's Report points out, based on the Commission's impartial and thorough investigation with the best available research, it seems much more likely that cocaine abuse (crack and other) is a reflection of sociological and psychological illness, not that such abuse causes such illness. It appears that the disparity and its attendant higher sentences are, for some *"reason" other than harm,* directed at the process by which the substance is created rather than the substance itself. So, if some enterprising chemist found another way to produce "cocaine base" and called it perhaps "stone," as opposed to "crack," "stone" would be exempt from the penalty for crack and treated as cocaine hydrochloride. I use this example only to illustrate the irrational nature of the current sentencing regime: for the first time in the history of this country, a substance has been singled out for different sentencing treatment than its chemical equivalents by its *"street" name!*[2] The result is an irrational sentencing regime that appears to have no other basis than the fact that it targets and impacts the minority community.

Congress established the United States Sentencing Commission to develop sentencing policies and practices that address congressional concerns, to evaluate policy effectiveness, to refine the sentencing guidelines, and to recommend needed legislation. The specialist Commission has accordingly made recommendations to correct the crack-versus-other-forms-of cocaine sentencing inequity and inefficiency. The Commission has recommended that it be allowed to treat all forms of cocaine on a 1–1 base sentencing ratio—with significant sentencing enhancements for relevant, *case-specific* harms like weapons use, violence, use of juveniles and criminal history. Such reform would move the nation's sentencing system out of the shadows of clumsy, racist myth, and into the light of reality. The Commission predicts that its enhancement recommendations will still result in case-specific sentences for crack at some 270% of the sentences for other cocaine offenses. Why is this "inadequate"?

III. "Reason," Rhetoric, Race Matters

A. Market based argument

By the mid 1980's anyone who had any knowledge in the field knew that crack was a phenomenon, while not confined to minority communities, existing primarily in these communities; that crack was sold primarily in these communities. Thus, it should have been clear to all but the most blind of observers that the brunt of the more severe penalties for crack would be borne by these communities. But certainly, the lessons of the last several years have proven this to be true.

Again, we are told by the champions of sentencing disparity that the sons and daughters of the minority communities should bear the brunt of these penalties; that the disparity is race neutral and driven by other factors. Irrespective of the thorough analysis to the contrary by the specialist Sentencing Commission, the Justice Department has attempted to "support" the disparity by citing among other things, the "street based marketing" patterns of crack and the development of the "crack house." I am torn by the question of whether these comments result from what we lawyers call "willful blindness," ignorance, or an irresponsible, slavish commitment to an obviously bankrupt (and bankrupting) policy driven by base political expedience.

"Street based marketing" of controlled substances is not new to the minority community (but neither are law enforcement "numbers"-enhancing, "street based" arrest and prosecution strategies). In the 1960's and 1970's, in most of our inner cities,

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hydrochloride and sodium bicarbonate and usually appearing in lumpy rock-like form. (Emphasis added.)

And an amendment in the Federal Register of May 6, 1993 (Vol. 58 No. 86 Part V) narrows the definition of cocaine base—"so that forms of cocaine base other than crack, e.g. coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride (powder cocaine) that scientifically is a base form of cocaine but is not crack, will be treated as cocaine hydrochloride."

[2] *See id.*

there were "street based markets" for the distribution of heroin. In short, "street based marketing" of controlled substances did not begin in minority communities with crack, and it is not likely to end with crack.

Little more interesting and certainly no more persuasive is the notion that the "crack house" is a new phenomenon. Places where people gathered to buy and sell heroin in the 1960's and 1970's, for example, were called "shooting galleries." The only difference between a crack house and a shooting gallery is the drug that is being used and the current visibility of the crack house.[3]

B. PROSECUTORIAL LEVERAGING ARGUMENT

The Commission recognized that among other problems, the 100–1 quantity ratio produces unintended results by punishing low-level (retail) crack cocaine dealers far more severely than their high-level (wholesale) suppliers of powder cocaine (from which crack is converted). Nonetheless, we now hear that a further "justification" for the crack-versus-other-forms-of-cocaine disparity is that prosecutors "need the power" of the additional crack penalties to get crack offenders to turn on their confederates. We need a 100:1 sentencing disparity because a gram dealer of crack is less likely to turn on his confederates than a multi-kilo dealer of other forms of cocaine? Common sense if not my experience seriously doubts this to be the case, and I certainly would like to see the statistical support for this conclusory statement. Of all the pro-disparity "arguments," this one is perhaps the most ridiculous and perhaps the easiest to dismiss as condescending at best and racist at worst. In truth, this "reasoning" is quite simple: African-Americans have a higher threshold of pain with respect to jail; therefore they need higher penalties. This view conjures up an ancient mythology which has its antecedents in the vile horror of slavery.

C. THE "SPECIAL VULNERABILITY" ARGUMENT

Let me also discuss what the Justice Department has called the special "vulnerability" of the communities in which crack is prevalent. An interesting euphemism—vulnerable communities. I guess this is supposed to be the rhetorical (if not Orwellian) means by which we do not have to discuss the more difficult matters of race.

These "vulnerable communities" are minority communities. But "crack" is a *symptom* of these communities' vulnerability and certainly not the cause. These communities are vulnerable for all the well known reasons: the poverty; the lack of adequate education; and because the economy of this nation has failed to create a reliable mechanism to provide employment for the youth of these communities. These youth see the American good life broadcast to them via television, hour after hour, day after day. They have no real means to acquire that life. Is there any wonder they turn to the drug trade as the employer (and "good life" hope) of last resort?

There has always been an underground economy in minority communities. And the underground economy will always exist until the earnings gap between African-Americans and Caucasians is closed. This underground economy has had many complexions over time: the speakeasy; after-hour clubs during prohibition, the numbers at other times; and now in this era, "crack."

IV. What Price Rhetoric?

A. PRESENT AND FUTURE SHOCK, SPECIFICALLY

By warehousing the sons and daughters of these minority communities for ever increasing periods of time, we do not solve the problem. We simply postpone dealing with the more grave problem. When we put an eighteen year old minority youth in the federal penitentiary for ten years for possessing fifty grams of crack, we assure our society of having to deal with a twenty-eight year old far less able to be productive in a society that has progressed in the ten years, while he was warehoused in the penitentiary. Welcome to our next nightmare. What do we then do with the twenty-eight year old less equipped to lead a productive life in this society than he

[3] Differences between crack cocaine and the most harmful drug, alcohol, are even more difficult to discern (other than the fact that alcohol is now no longer subject to prohibition). For example, well beyond crack houses, bars and advertising for alcohol are everywhere. And as the Commission's study discloses, fetal alcohol syndrome, a known cause of central nervous system abnormalities, is a more serious drug-related problem among newborns in this country than fetal cocaine syndrome (whether caused by crack or another formulation of cocaine—there is no way to distinguish the particular variety of the type cocaine used by the effects on an infant). See the Commission's February Report to Congress, at 52. (Also, a much more significant percentage of newborns are reported to suffer from fetal tobacco or marijuana exposure than from fetal cocaine syndrome. *See id.*)

was at the age of eighteen? How many prison building campaigns can America afford or endure? And how many thousands of minorities can we afford to incarcerate before we admit that this disparity is directed at the heart and soul of our communities: our youth.

B. PAST SHOCK, SPECIFICALLY—REVISITED AND LINGERING

I have said very little about the history of cocaine regulation in America, but I do feel a necessity to address this history. It seems that even our early attempts at the regulation of cocaine around the turn of the last century were guided by a mythology that was clearly racist. Have our nation's institutional leaders learned nothing since then, other than how to be more slick in terms of mythological packaging?

In *The American Disease—Origins of Narcotic Control 7* (1987) (expanded edition), David F. Musto, M.D., points out:

> If cocaine was a spur to violence against whites in the South, as was generally believed by whites, then reaction against its users made sense. The fear of the cocainized black coincided with the peak of lynchings, legal segregation, and voting laws all designed to remove political and social power from him. Fear of cocaine might have contributed to the dread that the black would rise above "his place," as well as reflecting the extent to which cocaine may have released defiance and retribution. So far, evidence does not suggest that cocaine caused a crime wave but rather that anticipation of black rebellion inspired white alarm. Anecdotes often told of superhuman strength, cunning, and efficiency resulting from cocaine. One of the most terrifying beliefs about cocaine was that it actually improved pistol marksmanship. Another myth, that cocaine made blacks almost unaffected by mere .32 caliber bullets, is said to have caused southern police departments to switch to .38 caliber revolvers. *These fantasies characterized white fear, not the reality of cocaine's effects, and gave one more reason for the repression of blacks.* (Emphasis added.)

Much of the debate which lead to the promulgation of the current intra-drug disparity, while somewhat more subtle in language, was driven by similar fears.

Certainly by 1987, the enhanced penalty for the possession or sale of crack was likely to decimate inner city youth. The Congressional Debate on June 28, 1990, regarding the (then-time) Omnibus Crime Bill, 136 Cong. Rec. at S 8997–9026, demonstrates that Congress was aware of the disproportionate impact of the draconian sentences for cocaine base upon African-Americans. During that debate, the Senate considered the propriety of the mandatory minimum sentencing scheme in light of the overwhelming evidence of its disparate impact upon African-Americans. The debate included numerous references to African-Americans receiving disproportionately high sentences for possession and sale of cocaine base. Specifically, it was acknowledged that "most long term drug users are black or Hispanic, and were born poor." *Id.* at S 9014. The record reveals that "mainly because of the new drug sentencing laws, . . . the proportion of black [and] Hispanic . . . offenders is steadily increasing," and that "most drug offenders who get caught are Black or Hispanic." Perhaps most alarming was this vision:

> Given the pervasiveness of drug culture in many inner city areas, *the Gramm-Gingrich approach could begin to approximate simply rounding up young urban blacks and putting them into involuntary servitude on chain gangs.* [136 Cong. Rec. S 9018 (Emphasis added).]

Modern-day law makers' reaction to crack was predicted by Dr. Musto, *supra,* at 277:

> Reflecting on the earlier wave of drug intolerance, one cannot help but be concerned that the fear of drugs will again translate into a simple fear of the drug user and will be accompanied by draconian sentences and specious links between certain drugs and distrusted groups within society, as was the case with cocaine and Southern blacks in the first decade of this century.

And as the Commission's comprehensive, Spring 1995 Report and Recommendations make plain: it cannot reasonably be said that it is a function of mere serendipity that the brunt of an irrational cocaine sentencing disparity has fallen most heavily upon African-Americans and other non-white members of our community. *See generally* Attachment A, NACDL Comments to Commission. It is important to recognize in this respect that just two years ago we were confronted with a similar public

outcry and criticism surrounding sentences for L.S.D. The Commission amended the sentencing guidelines to avoid the undue influence of varied carried weight on the applicable offense level. *See Amendments* to the Sentencing Guidelines, United States Sentencing Commission, May 4, 1993, p. 43. L.S.D. is a drug distributed primarily by Caucasians. (94.3% of all L.S.D. dealers were Caucasian. U.S. Sentencing 1992 Data File MonFY92.) There was no concerted effort by the Administration or institutional others then to block the Commission's reasonable and fair amendments.

V. Stealing Tomorrow: A Safer Society If Not a Fair One? (Just Another Myth)

If for no more honorable reason than our own societal self preservation, we need to heed where the current state of affairs is taking us: A raging epidemic of poor, dumb children in the richest, most educated nation on earth can be ignored (for now) because these children have no power, no constituency. They cannot vote. They have no money. They own no property. There is no well financed, influential Washington based lobby group insuring that their birthright is protected.

> But there are more of them every day. And they are having babies who will be poorer, and dumber then they are. They will be poorer and dumber and have no allegiance to this or any nation, no concept of right or wrong, no adherence to cherished traditions and no compassion or regard for the elders who abandoned them. Soon 14 million poor children will become 14 million unskilled uneducated, angry dangerous adults. *There will not be enough jails, enough bullets, enough quick fix federal programs.* There will be them and an older feebler, increasingly dependent us. They will blot out the sky, foul the air, make the water unfit to drink. They will steal tomorrow. They are time bombs. [Don Williamson, Philadelphia Daily News, November 4, 1985 (emphasis added).]

"They will steal tomorrow." And society will have aided and abetted the theft.

VI. Conclusion

There is precedent to remedy the gross unfairness, inefficiency, and societal risk imposed by the current cocaine sentencing regime (see e.g., discussion of LSD amendments, *supra*). The unfairness and the attendant harm here is manifest. And this harm is more than an individual sentence in an individual case. Young African-Americans and Latinos, as races and as a generation, are being "asked" to bear the brunt in a never ending "war." We should be aware that when the metaphor of war is used, casualties are sure to be at hand. In *this* war, we continue to inflict casualties upon ourselves. We are taking those who have little or no stake in this society and giving them less. We diminish our own stake in the process.

A few words, if you will, from the front line: in the last several years, I have on far too many occasions stood before many United States District Court Judges, accompanied by African-American males between the ages of seventeen and twenty-seven who were to be sentenced for varying degrees of involvement with a substance which has come to be called "crack" and which has become all too institutionally synonymous with "black." Before each of these sentencings, I knew several things: Most often my client was immature, unemployed, and had little understanding of the full impact of what was about to happen to him. And I knew that because the client had been involved with "crack," he was about to be singled out for the most severe punishment. Often times because of the nature of the sentencing guidelines formulation of "relevant conduct," the client was to be sentenced not just for his acts, but for acts of alleged confederates.

I have had to the look parents of these young men in the eyes and explain to them that fifty grams of crack translates into a mandatory minimum sentence of ten years for their child, and that as little as five grams of crack translates into a mandatory minimum of five years. I have also looked into the eyes of those parents when I explained to them that this rich, mostly white society has decided that with respect to rich white people's powdered cocaine, one would have to be involved with one hundred times those amounts to get approximate sentences.

When the inevitable questions have come, I confess that I have refused to become an apologist for a policy that I believe was a product of hysteria, at best ill-conceived and unwise and at worst a vestige of a grossly unfair inequality in America that most of us would like to forget, *and at least not reconjure.* Here is our collective chance: After an extensive, congressionally-mandated and taxpayer-funded study, drawing upon the best research in the area, the objective, specialist United States Sentencing Commission recommends removal of the stark racial disparities in sen-

tencing for crack and other forms of the same drug, cocaine. This recommendation implements the Commission's findings, in its comprehensive, 242 page (congressionally-mandated and taxpayer-funded) Report of February, 1995—that the current sentencing scheme is unfounded and unfair. Still, the Commission predicts its fair and reasonable recommendations will likely result in case-specific sentences for crack at some 270% of the sentences for other cocaine offenses (as a result of case specific harm enhancements for such relevant factors as weapons use, violence, use of juveniles and criminal history). Really, what is there to fear?

The public has become aware that warehousing non-violent drug offenders in prison space more effectively (and economically) used for violent offenders is a bankrupt and bankrupting policy. *See e.g.*, Attachment B, Coyle Study for NACDL.

So, on behalf of the National Association of Criminal Defense Lawyers, the citizens and basic constitutional principles our members represent: I urge the Subcommittee to heed the Sentencing Commission's recommendations, and resist any temptation to pull the proverbial rug out from under this specialist body because the conclusions reached by it in the course of its lengthy, thoughtful study are not to the sound bite liking of the irresponsible and rhetorically whimsical.

WRITTEN PUBLIC COMMENTS FOR THE RECORD BY GERALD H. GOLDSTEIN, FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, APRIL 10, 1995, REGARDING THE U.S. SENTENCING COMMISSION'S FEBRUARY 1995 REPORT TO CONGRESS, AND FUTURE CONGRESSIONAL RECOMMENDATIONS, ON THE CURRENT 100–1 FEDERAL SENTENCING DISPARITY BETWEEN "CRACK" AND POWDER COCAINE OFFENSES

On behalf of the National Association of criminal Defense Lawyers (NACDL), I want to thank the Commission for the opportunity to submit for the record the following public comment on the Commission's February 1995 special report to Congress regarding the current 100–1 "crack" versus powder cocaine sentencing disparity, and the Commission's intention to submit to Congress recommendations on May 1, 1995—for case-specified, guidelines adjustment-oriented models for modification of the federal sentencing policy as it relates to cocaine offenses.

I. NACDL APPLAUDS THE COMMISSION'S WORK AND URGES COMMISSION ACTION IN FULL ACCORDANCE WITH THE REPORT'S COMPREHENSIVE RESEARCH

The members of NACDL, front-line defenders of the People's rights and liberties, have long recognized and pushed for reform of the irrational and unfair federal requirements that impose a mandatory minimum sentence of at least five years for the first time possession of more than five grams of cocaine "base" ("crack"), while imposing a minimum sentence of probation for the possession of the same quantity of cocaine hydrochloride (powder cocaine). The mandatory sentence for possession of 50 grams of crack is ten years. While for this same penalty, a defendant would need to be convicted of possessing 100 times as much powder cocaine. A defendant with no prior convictions who is found guilty in federal court of possessing 70 grams of powder cocaine with the intent to sell it faces between 21 and 27 months in prison. Meanwhile, a like conviction involving the same amount of crack cocaine would qualify for a sentence more than five times as long—between 10 and 12½ years. From both the market-value and the potential punishment perspectives, powder cocaine, and not crack, is in fact the more profitable drug.[1]

As the report states: the Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207 (1986), created the basic framework of mandatory minimum penalties that currently apply to federal drug offenses. This Act establishes two tiers of mandatory prison terms for those convicted as first-time drug distributors—a five-year and a ten-year minimum sentence. Under the terms of the statute, the different minimums are triggered depending on the quantity and the type of drug involved. This 1986 Act gave birth to the federal criminal law sentencing distinction between cocaine "base" and other forms of the same drug. The quantity thresholds triggering the penalties create the 100–1, crack versus powder cocaine sentencing ratio.

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[1] *See, e.g.*, Table 19 in *Special Report to Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission 173 [herein the February 1995 report or the report] ("Street-Level Value of Drug Quantity By Drug Type and Base Offense Level") (reflecting, for example, that in order for one to reach a quantity-oriented, "base offense level" for sentencing purposes of "20," one must either have been convicted of $21,400 worth of powder cocaine, or else, $230 worth of crack; likewise, to reach the highest base offense level, "38," one must be convicted of either $16,050,000 worth of powder cocaine, or else $172,500 worth of crack).

As the report also well notes: the 1986 Act "was expedited through Congress. As a result, its passage left behind a limited legislative record.[2] While any individual members delivered floor statements about the Act, Congress dispensed with most of the typical legislative process, including committee hearings. And no committee produced the standard committee report on the legislation reflecting actual *analysis* of the Act's provisions.[3] The legislative history thus does not include any discussion of the Act's 100–1 crack versus powder cocaine quantity-based sentencing disparity.[4] But we do know this:

> The sentencing provisions of the Act were initiated in August 1986, following the July 4th congressional recess during which public concern and media coverage of cocaine peaked as a result of the June 1986 death of NCAA basketball star Len Bias.[5]
>
> A few weeks after Bias's death, on July 15, 1986, the United States Senate's Permanent Subcommittee on Investigations held a hearing on crack cocaine. During the debate, Len Bias's case was cited 11 times [ ] in connection with crack.[6]
>
> Eric Sterling, who for eight years served as counsel to the House Judiciary Committee and played a significant staff role in the development of many provisions of the Drug Abuse Act of 1986, testified before the United States Sentencing Commission in 1993 that the "crack cocaine overdose death of NCAA basketball star Len Bias" [ ] was instrumental in the development of the federal crack cocaine laws. During 1986 alone, there were 74 evening news segments about crack cocaine, many fueled by the belief that Bias died of a crack overdose.[7]
>
> Not until a year later, during the trial of Brian Tribble who was accused of supplying Bias with the cocaine, did Terry Long, a University of Maryland basketball player who participated in the cocaine party that led to Bias's death, testify that he, Bias, Tribble, and another player snorted powder cocaine over a four-hour period. Tribble's testimony received limited coverage.[8]
>
> And still, for almost a decade now, this irrational and unfair system of cocaine sentencing disparity—child of hysteria and haste—has existed without comprehensive examination. There have been many victims of this system over the years. And they have been among the most vulnerable, at-risk members of our society: the poor, the young and the minority.

NACDL accordingly applauds the Commission for its February 1995 report's comprehensive research, and for the report's unequivocal conclusion that the current 100–1 sentencing ratio between crack and powder cocaine offenses is too high, irrational and unfair. Further, though, NACDL respectfully urges the Commission to act in accordance with the facts canvassed in the report. While NACDL commends the Commission for the studied research reflected in the February 1995 report, NACDL submits that the Commission should immediately follow the data referenced in the February 1995 report to the data's full, logical conclusion: there is no rational justification for any sentencing disparity between powder and crack cocaine; racism and unfounded suspicion should be removed from the federal sentencing law; the sentencing guidelines' (and statutory) ratio between powder and crack cocaine should be 1–1, with all cocaine offenses being subject to the same penalties as those now in effect for powder cocaine.

There Is No Rational Basis for Any Disparity Between Crack and Powder Cocaine

Although several courts have generously deferred to the congressional cocaine sentencing conclusion—i.e., assuming that Congress must have had some reason for its creation of the crack versus powder cocaine sentencing disparity—the research

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[2] *Id.* at 116.

[3] *See id.* at 116–117. *See also, e.g.,* 132 Cong. Rec. 26,462 (Sept. 26, 1986) (statement of Sen. Mathias) ("Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process.").

[4] February 1995 report, *supra* note 1, at 117.

[5] *Id.*

[6] *Id.* at 123 (citing transcript of the "Crack Cocaine" hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Congress).

[7] *Id.* (citing testimony of Eric Sterling before the United States Sentencing Commission on proposed guideline amendments, public comment, March 22, 1993).

[8] *Id.*

and analysis of the Commission's report shows that any assumed congressional "rationale" must be regarded as simply unfounded, and erroneous. The abbreviated, murky legislative history does not provide a consistently cited "rationale" for the crack versus powder cocaine penalty structure.[9] But, as the Commission's report rightly points out, to the extent Congress can be viewed as having perhaps thought about support for its statutory conclusion to create a 100–1 crack versus powder Cocaine sentencing disparity, it's conclusion rests upon mere "assumptions": assumed qualities of addictiveness; speculative correlations to other, serious crimes; conjured special psychological effects of this newly discovered bogey-man called crack; fears of heightened risks to youths; and the supposedly peculiar "purity and potency," market incentives, and ease of movement qualities of crack.[10]

A. REGARDING "PURE AND POTENT," AND EASE OF MOVEMENT AND ADMINISTRATION ASSUMPTIONS

Yet, as the Commission's report clarifies: the mood altering ingredient in both powder and crack is the same—cocaine. "Pure and potent" cocaine powder can be easily moved and administered, and it can be easily transformed into crack by combining the powder with baking soda and heat.

The difference in effect between the two varieties of cocaine lies in the way the drug is ingested. Cocaine powder is generally sniffed or snorted through the nostrils or dissolved in water and administered intravenously, whereas crack is usually smoked in a pipe. The onset of drug effects is slowest for swallowing and sniffing, and fastest for smoking and injection. Intravenous injection deposits drugs directly into the user's bloodstream, for fast transmission to the user's brain.

B. REGARDING MEDICAL AND ADDICTION ASSUMPTIONS

Of course, the use of drugs, including all forms of cocaine, impacts upon the public health of the United States.[11] But speculation and Congress-inspiring sports celebrity deaths aside,[12] according to emergency medical experts: there is no objective scientific data to support the oft-cited assumption that crack is more addictive or dangerous than the powder cocaine from which it is derived. In fact, studies disclose that the most frequent route of administration for cocaine-related deaths is through *injected,* water-dissolved, powder cocaine—not by the smoking of crack.[13] Crack cannot be injected.

Likewise, the injection of cocaine powder—and not the smoking of its derivative, crack—increases the social threat of infections (including HIV and hepatitis).

And as the Commission report also notes, although the national estimate of (crack and powder) cocaine-exposed infants according to some studies is notable at between two to three percent, cocaine is actually used less frequently during pregnancy than are all sorts of other drugs, both "licit" and "illicit."[14]

C. REGARDING ASSUMPTIONS ABOUT "SPECIAL PSYCHOLOGICAL EFFECTS"

Certainly, when cocaine use becomes uncontrolled, an individual's links to the social and economic world disintegrate. As the report reflects, some studies even find that physical, psychological, and behavioral changes in an individual can begin soon

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[9] *Se id.* at. 121.

[10] *See generally id.* at 118.

[11] Still, as the report points out, studies by organizations including the Drug Abuse Warning Network (DAWN) and the Rand Foundation reflect that the casual use of cocaine has decreased since 1988; and that fewer Americans are now using cocaine than in the 1980's. *Id.* at 46–47. In fact, in terms of drug-based causes of hospital emergency room visits, cocaine ranks behind alcohol. *Id.* at 41.

[12] In addition to the assumed crack-related death of the Boston Celtics' first-round basketball draft pick, Len Bias, Congress was moved by the drug-related death of Cleveland Browns football player Don Rogers. "Recalling [these deaths], members of Congress [supporting the proposed 1986 Act] repeatedly described the dimensions of the drug problem in such dramatic terms as 'epidemic.'" *Id.* at 121.

[13] *See, e.g., id.* at 44–45. But it is also important to recognize, as the Commission has in its report, that "[a]mong cocaine-related deaths, concurrent use with alcohol was the most deadly combination." Id. at 45 (Emphasis added).

[14] *See, e.g., id.* at 52 (citing *inter alia* D. Gomby & P. Shiono, *Estimating the Number of Substance-Exposed Infants,* The Future of Children 22 (Spring 1991)). As the report has well recognized: fetal *alcohol* syndrome, a known cause of central nervous system abnormalities, is a more serious drug-related problem among newborns in the United States than fetal cocaine syndrome (whether caused by crack or powder—there is no way to distinguish the particular variety of the drug used by the effects on the infant); and a much more Significant percentage of newborns in this country are reported to suffer from fetal tobacco-exposure or fetal marijuana-exposure, than from fetal cocaine syndrome. *Id.*

after the person begins to use cocaine. But there is nothing peculiarly pernicious about crack cocaine.

When users of cocaine, powder or crack, become dependent upon the drug, their family and social lives typically disintegrate. And the most "at risk" users—the unemployed—frequently are asked, or forced, to leave their family or friendship units. For example, as the report notes: in a study of voluntary inpatients in a hospital unit, 18.7 percent of the 245 study participants disclosed that they had been asked or forced to leave their social units; and of these individuals, more than half (51.1%) became homeless.[15] Research shows that those who are drug abusers and become homeless will likely abuse alcohol and other drugs. And homeless shelters in New York City, for example, have reported that the current most frequently abused drug among the shelter residents is cocaine—but again, both crack and powder.[16] Yet, as the Commission's report suggests, it seems as likely that cocaine abuse is a *reflection* of sociological and psychological illness as it is likely that (as some members of Congress might be seen to have assumed in 1986) such use causes such illness.

Further, the report's discussion of psychopharmacological-driven crime data is telling. For example, *alcohol-related* homicides are considered to be psychopharmacological-driven at a considerably more significant rate than any other drug—includlng cocaine (of either the powder or crack variety).[17] And at least one influential study concludes that "to date, there has been no systematic research linking crack cocaine use with increased psychopharmacological driven] violence."[18]

D. REGARDING MARKET-VALUE ASSUMPTIONS

As stated above, the market-value assumption about crack cannot withstand analysis. The report recognizes this:

> Individuals at the top of the drug distribution chain make considerably more money than others [lower down] in the organization. [ ] DEA data for 1992 indicate domestic wholesalers can purchase a kilogram of powder cocaine from Colombian sources for $950–$1,235. Powder cocaine from other source countries such as Bolivia and Peru generally is more expensive, typically selling for $1,200–$4,500 and $2,500–$4,000 a kilogram, respectively. . . . [A] kilogram of powder cocaine can be sold wholesale, after dilution, for $11,000–$42,000, and can be marketed, after further dilution, in gram quantities for $17,000–$173,000. These figures, not considering distribution expenses, produce profits of $16,000–$171,000 per kilogram of powder cocaine.[19]

And yet, the 100–1 sentencing disparity between crack and powder cocaine results in market-oriented sentencing irrationality: for example, in order for one to reach the quantity-oriented base offense level of "20," one must either have been convicted of $21,400 worth of powder cocaine, or else, a mere $230 worth of crack.[20]

E. REGARDING ASSUMPTIONS ABOUT CORRELATIONS TO OTHER, SERIOUS OFFENSES

The report notes that at least one major study has concluded that it is the frequency with which one sells a cocaine product, and not the selling of cocaine in its smokeable form, that seems to best explain any violence associated with cocaine distribution.[21] Several researchers agree: "[T]he primary association between [crack] cocaine and violence is systemic. It is violence associated with the black market and distribution."[22] And as also noted in the February 1995 report, studies reflect that systemic violence of this sort is found in analyses of powder cocaine, and presumably other illicit drug markets as well.[23]

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[15] *Id.*, at 58 (Citing B. Wallace, *Crack Addition: Treatment and Recovery Issues,* Contemporary Drug Problems 74 (Spring 1990)).

[16] *Id.* at 58–59 (citing W. Breakey & P. Fischer, *Homelessness: The Extent of the Problem,* Journal of Social Issues 40 (1990)).

[17] *See e.g., id.* at 98–99 (citing P. Goldstein, Drugs and Violent Crime, Pathways to Criminal Violence, table 2, 665 (Neil A. Weiner et al., eds. 1989)).

[18] J. Fagan, *Intoxication and Aggression,* in M. Tonry & J.Q. Wilson Drugs and Crime (1990)), *quoted in id.* at 99.

[19] The report, *supra* note 1, at 87 (citing *inter alia,* United States Department of Justice, *Drug Enforcement Administration, Source to the Street: Mid-1993 Prices for: Cannabis, Cocaine, Heroin 6* (Sept. 1993)).

[20] *See* Table 19, *id.* at 173.

[21] *See* the report, *supra* note 1, at 95 (quoting K. Chin & J. Fagan, *Violence as Regulation and Social Control in the Distribution of Crack,* in M. de la Rosa, B. Gropper, and E. Lambert (eds.), Drugs and Violence: Causes, Correlates and Consequences 36 (1990)).

[22] United States Sentencing Commission, Hearing on Crack Cocaine (Nov. 1993).

[23] *See, e.g.,* February report, *supra* note 1, at 97–98.

F. REGARDING ASSUMPTIONS ABOUT OTHER HEIGHTENED RISKS

Already-existing guideline enhancements sufficiently account for any additional harm that may actually be found associated with cocaine offenses. Federal sentencing guidelines account for the involvement of firearms, or other dangerous weapons; serious bodily injury, or death; the use or employment of juveniles; leadership roles played by one in the commission of an offense; prior criminal histories; and other aggravating factors. Additional, sweeping, "built-in" sentencing enhancements reflecting crack cocaine's presumed, peculiar, always-aggravating qualities are unnecessary, unfair, and—in the creation of irrational, increased incarceration time—economically inefficient in their undue cost of tax dollars, as well.

For example, with regard to the issue of youth, especially youth gang related activity: as the report reflects, noted researchers have concluded that it is "the underlying culture of the gangs in a particular area that accounts for the violence more than anything else."[24] And as the report reflects, other researchers have drawn like conclusions about the various, complex, non-crack-oriented social factors underlying gang and inner-city Cultural violence—such as "the increasing social and economic disorganization of the nation's inner cities beginning in the 1980's, and the mounting proliferation of more powerful guns . . . ."[25] Indeed, as the Commission's report points out: researchers tend to agree that from a historical perspective, crack cocaine is not unique. For example, as Professor Paul J. Goldstein testified before the Commission, the national homicide rate has "changed very little over the last 25 years." Indeed, in 1992, the homicide rate was lower than in 1980, when systemic violence arising out of the newly developing powder cocaine market was about at its peak, and lower than in 1933—at the end of *alcohol prohibition*.[26]

G. RECAP REGARDING ASSUMPTIONS

Although some courts have generously deferred to Congress with regard to the 100–1 sentencing disparity between crack and powder cocaine—i.e., assuming that Congress must have had some "reasons" for creating this disparity—the Commission's report shows that any such assumed "rationales" are but flawed, erroneous assumptions. In short, the 100–1 crack versus powder cocaine sentencing disparity is shown by the Commission's report to be irrational, unwarranted, unfair, and economically inefficient—when assessed under the very terms assumed to have been assumed by Congress.

III. Race Matters

Certainly given the irrational 100–1 cocaine sentencing policy, the racial ramifications of this sentencing policy invoke strong questions about our Nation's constitutional conceptions of equal protection, fundamental fairness and the People's right to be free from illogical, excessively disproportionate punishment.

The evidence does reflect that crack cocaine is significantly different from powder cocaine in one respect: crack sentences are almost exclusively meted out to African-Americans, while most powder cocaine sentences are Caucasian-Americans (the latter group being also the predominant group in Congress, in the federal Judiciary, and in the upper economic echelons of the populace generally).

Indeed, as this Commission knows and has recognized in its report, of all the defendants sentenced for crack cocaine offenses in the federal system, approximately 90% are African-American. In 1992, for example, *92.6%* were African-American; and *all* of the persons sentenced in the federal system for simple possession of crack cocaine were African-American.

Certainly, in the light of the sentencing policy irrationality reflected in the report and referenced above, such "statistics" raise grave concerns about the grossly negative impact of this 100–1 policy on African-Americans—given our society's supposedly equal, constitutional democracy. These African-Americans are subject to serving long mandatory minimum sentences for simple possession of small amounts of crack cocaine, while those typically Caucasian first time offenders convicted of

[24] Testimony of Dr. J.H. Slotnick before the United States Sentencing Commission, Hearing on Crack Cocaine (Nov. 1993), at 70, *quoted in id.* at 104. *See also* E. Walsh, "Chicago Street Gang Study Shows Fearful Toll of Powerful Weapons," Wash. Post A 4 (Nov. 29, 1993) (citing study conducted by Carolyn Rebecca Black and Richard Black, which concluded that *gang turf battles* in many areas were more likely to lead to homicides than were drug trafficking disputes).

[25] Statement of Steven Belenko *in* J. Fagan, *Intoxication and Aggression*, in M. Tonry & J.Q. Wilson, Drugs and Crime (1990), at 27, *quoted in* February 1995 report, *supra* note 1, at 105.

[26] February report, *supra* note 1, at 108 (citing J. Inciardi & A. Pottieger, *Crack-Cocaine Use and Street Crime*, Journal of Drug Issues (1994), at 65).

possession of a much greater quantity of cocaine powder are subject to minimal sentences (even probation).

IV. Sentencing Irrationality and Socio-Economic Inefficiency

NACDL points out that the irrational, unfair sentencing disparity between crack and powder cocaine offenses carries serious macro-economic costs in addition to the costs such a policy extracts from individual sentences and in turn, from our Nation's fundamental conceptions of justice. Increased mandatory minimums of the irrational sort existing under the current system of cocaine sentencing take substantial amounts of taxpayer dollars to fund; dollars that could be more usefully and rationally applied, e.g., to the future of this country—to education or national debt interest payments.

V. NACDL Urges the Commission To Recommend Retroactive Application of a 1–1 Crack/Powder Cocaine Sentencing Ratio

The current cocaine sentencing system has been allowed to exist for too long, at great costs to individual lives and great cost to taxpayers. NACDL encourages the Commission to recommend to Congress a 1–1 ratio between crack and powder cocaine sentences. Further, NACDL strongly urges the Commission to recommend that this change be given immediate, *retroactive* effect.

It is not the fault of the victims of this flawed and racist eight-year-old policy—those sentenced under the crack 100–1 automatic enhancement policy—that this policy came into existence and was allowed to exist for a significant period of time. They should be peculiarly and irrationally punished under this pernicious regime no longer. They should not be forced to continue the unreasonable forfeiture of their lives to this clearly flawed system of cocaine sentencing. The similarly situated should be similarly situated. This is a priceless fundamental value.

Further, though, the taxpayers deserve retroactive relief. They should be given the monetary relief associated with a retroactively applicable implementation of a more equitable, efficient cocaine sentencing policy. Indeed, any institutional costs associated with such retroactive application of a 1–1 cocaine sentencing ratio are obviously and substantially less than the costs associated with the continued subsidized irrationality of incarcerating those convicted of crack offenses, who should by all rights be serving but the sentence they would have received had they been but convicted of a powder cocaine offense. At the very least, such sanity and fairness would make room for the incarceration for the truly violent offenders among us, and perhaps even save us all the tax costs of a new prison or two.

VI. Conclusion of NACDL Comments

Again, NACDL applauds the comprehensive research reflected in the Commission's report, and is grateful to the Commission for this opportunity to offer comments about the report and the Commission's forthcoming recommendations to Congress on cocaine sentencing policy. NACDL respectfully encourages the Commission to follow through on the implications of its study—to recommend to Congress an immediate and retroactively applicable establishment of a fair and rational, 1–1 cocaine sentencing ratio, with all cocaine offenses being subject to the same penalties as those in effect for powder cocaine.

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June 14, 1995

Gerald H. Goldstein, President
National Association of Criminal Defense Lawyers
1627 "K" Street, NW, Suite 1200
Washington, DC 20006

re: *Report to NACDL:* Statistical Analysis of Potential Savings from Enactment of the Revised Crack Cocaine Penalties

Dear President Goldstein:

As you and I have discussed, back in 1990, I handled my first federal crack cocaine case as a defense lawyer. Since that time, I have seen many people (all African-Americans) warehoused by the unfair penalties associated with federal crack cocaine sentencing. The statistics in the attached report can be viewed as supplementing the materials transmitted to Congress by the U.S. Sentencing Commission on May 1, 1995, when the Commission recommended enactment of the "Cocaine Penalty Adjustment Act of 1995." These data are particularly relevant to the prison impact information mandated by Section 20402 of the Violent Crime Control and Law Enforcement Act of 1994 (18 U.S.C. Section 4047(a)).

The report demonstrates the enormous savings to the nation -- $3 5 billion -- that could be realized by passage of this important legislation. Three law students in my office -- Bennett Hirschhorn, Maurice Woods, and Ambre Gooch -- worked non-stop for three weeks to ensure that the figures in the report are as accurate as humanly possible. They drew on materials from Congress, the Sentencing Commission, and the U.S. Bureau of Prisons. Their commitment has been extraordinary.

I hope that our statistical report will give added momentum to the outstanding efforts of the Sentencing Commission, NACDL and other concerned organizations to rectify the terrible inequity of crack cocaine sentences. They clearly show that equalizing sentences is not just the right thing to do; it will save taxpayers money, too.

Respectfully yours,

J. W. Coyle, III

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June 9, 1995

Dear Reader:

In 1990 I handled my first federal crack cocaine case as a defense lawyer. Since that time I have seen many people (all African Americans) warehoused by the unfair penalties associated with federal crack cocaine sentencing. The statistics that follow in this report are hopefully supplemental to the materials transmitted to Congress by the U.S. Sentencing Commission on May 1, 1995 recommending passage of the "Cocaine Penalty Adjustment Act of 1995", and particularly the prison impact section mandated by §20402 of the Violent Crime Control Law Enforcement Act of 1994. (18 U.S.C. §4047(a))

What we have attempted to do is translate into dollars the enormous savings ($3.8 billion) realized by passage of this important legislation.

Three law students in my office have worked virtually non-stop for the last three weeks to insure that the figures in this report are as accurate as possible. They have utilized statistics and written materials from Congress, the U.S. Sentencing Commission, and the Bureau of Prisons. The commitment of students Bennett Hirschhorn, Maurice Woods, and Ambre Gooch has been extraordinary.

I am convinced that our greatness as a nation is determined by how fairly we treat the weakest members of our society. No one holds less power than the shackled prisoner standing before the bar of justice.

Respectfully yours,

J. W. Coyle, III

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STATISTICAL ANALYSIS OF POTENTIAL SAVINGS FROM ENACTMENT OF THE REVISED CRACK COCAINE PENALTIES

JUNE 9, 1995

Studies prepared by:
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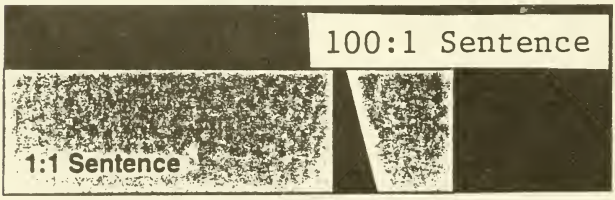
Potential Savings:	$ 3,452,612,222.62
$ Spent to Date:	$ 399,363,435.55

In cases where the 1:1 sentence would end before the **Date of Enactment** of the Sentencing Commission's Recommendation, the **Potential Savings** account for the months after the date of enactment. **$ Spent to Date** account for the prison months between the end of the 1:1 sentence and the **Date of Enactment.**

Date of Enactment of 1:1

In cases where the 1:1 sentence would end after the **Date of Enactment**, the **Potential Savings** account for the months after the 1:1 Sentence.

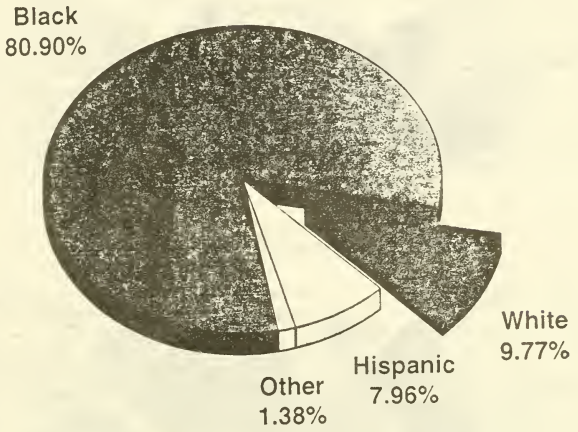


Date of Enactment of 1:1

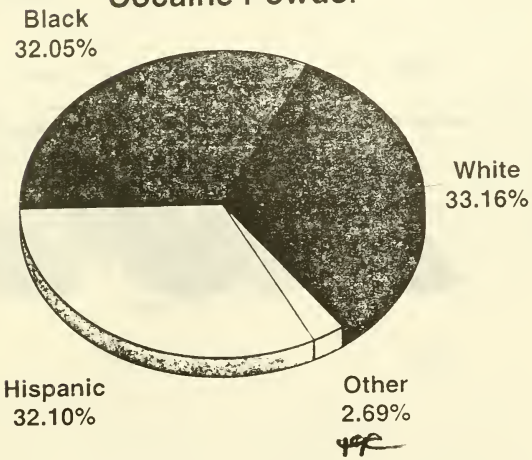
* For a complete breakdown of savings by year and by Crack Powder Sentencing ratios at 1 1, 5 1, and 10 1, see tab 5

Convictions in Our Federal Courts by Race

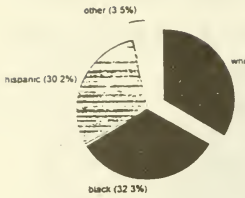
Cocaine Base (Crack)



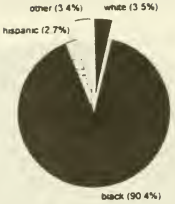
Cocaine Powder



Powder

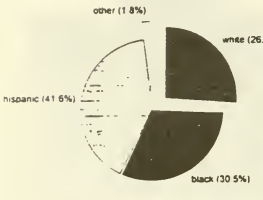


Base(Crack)



	1995
crack figures by race	4484
white	159
black	4053
hispanic	120
other	152
powder figures by race	3447
white	1173
black	1113
hispanic	1040
other	121

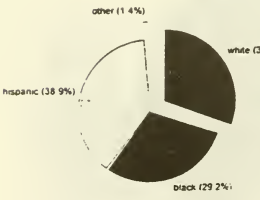
Powder



Base(Crack)

	1994
crack figures by race	3323
white	94
black	3042
hispanic	180
other	7
powder figures by race	4378
white	1140
black	1337
hispanic	1821
other	80

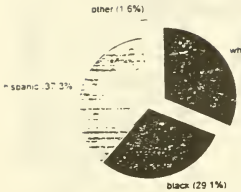
Powder



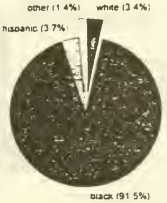
Base(Crack)

	1993
crack figures by race	3313
white	148
black	2922
hispanic	229
other	18
powder figures by race	5954
white	1818
black	1741
hispanic	2314
other	81

Powder

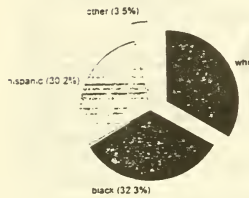


Base(Crack)

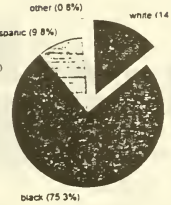


	1992
Crack figures by race	2504
white	86
black	2290
hispanic	93
other	35
Powder figures by race	7272
white	2330
black	2115
hispanic	2711
other	116

Powder

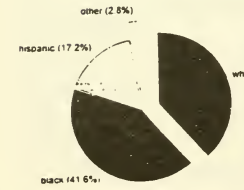


Base(Crack)

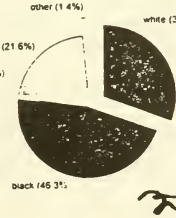


	1991
Crack figures by race	2363
white	332
black	1780
hispanic	232
other	19
Powder figures by race	2297
white	781
black	742
hispanic	693
other	81

Powder

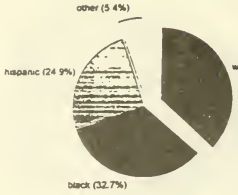


Base(Crack)

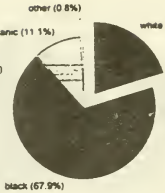


	1990
Crack figures by race	2706
white	831
black	1254
hispanic	584
other	37
Powder figures by race	4260
white	1637
black	1[illegible]
hispanic	[illegible]
other	[illegible]

Powder

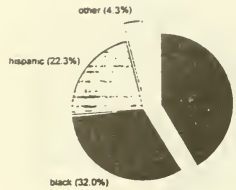


Base(Crack)

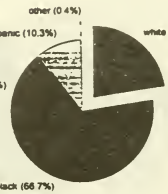


	1989
crack figures by race	1422
white	288
black	965
hispanic	158
other	11
powder figures by race	4841
white	1723
black	1518
hispanic	1157
other	249

Powder



Base(Crack)



	1988
crack figures by race	243
white	55
black	162
hispanic	25
other	1
powder figures by race	1148
white	476
black	367
hispanic	256
other	49

Yearly Analysis of Potential Dollars Expended, Dollars Spent to Date, and Potential Savings from Enactment of the Sentencing Commission's Recommendation

	1995
1:1 total for extra $ spent at 100:1	$649,782,188.85
$ spent to date	$0.00
potential savings	$649,782,188.85

	1994
1:1 total for extra $ spent at 100:1	$513,895,425.06
$ spent to date	$0.00
potential savings	$513,895,425.06

	1993
1:1 total for extra $ spent at 100:1	$544,606,811.85
$ spent to date	$16,768,558.76
potential savings	$527,838,253.09

	1992
1:1 total for xtra $ spent at 100:1	$436,000,349.00
$ spent to date	$42,124,355.00
potential savings	$393,875,994.00

	1991
1:1 total for xtra $ spent at 100:1	$626,062,707.42
$ spent to date	$79,182,883.79
potential savings	$546,879,823.63

	1990
1:1 total for extra $ spent at 100:1	$672,508,309.00
$ spent to date	$154,474,875.00
potential savings	$518,033,434.00

	1989
1:1 total for extra $ spent at 100:1	$354,978,175.00
$ spent to date	$88,434,736.00
potential savings	$266,543,439.00

	1988
1:1 total for extra $ spent at 100:1	$54,141,692.00
$ spent to date	$18,378,027.00
potential savings	$35,763,665.00

Dollars Spent at 100:1, Dollars Spent to Date, and Potential Savings if Congress Adopts an Alternative Crack:Powder Sentencing Ratio of 5:1 or 10:1 in Opposition to the Recommendation of the Mandate to the Sentencing Committee

5:1 total for extra $ spent at 100:1	$2,880,911,356.57
$ spent to date	$276,979,826.10
potential savings	**$2,603,931,530.47**

10:1 total for extra $ spent at 100:1	$2,329,848,249.33
$ spent to date	$227,339,843.18
potential savings	**$2,102,508,406.15**

	1995
1:1 total for extra $ spent at 100:1	$649,782,188.85
$ spent to date	$0.00
potential savings	$649,782,188.85
5:1 total for extra $ spent at 100:1	$416,689,844.84
$ spent to date	$0.00
potential savings	$416,689,844.84
10:1 total for extra $ spent at 100:1	$266,773,525.67
$ spent to date	$0.00
potential savings	$266,773,525.67
total crack	4484
total powder	3447

	1994
1:1 total for extra $ spent at 100:1	$513,895,425.06
$ spent to date	$0.00
potential savings	$513,895,425.06
5:1 total for extra $ spent at 100:1	$348,201,291.44
$ spent to date	$0.00
potential savings	$348,201,291.44
10:1 total for extra $ spent at 100:1	$243,507,415.59
$ spent to date	$0.00
potential savings	$243,507,415.59
total crack	3323
total powder	4378

	1993
1:1 total for extra $ spent at 100:1	$544,606,811.85
$ spent to date	$16,768,558.76
potential savings	$527,838,253.09
5:1 total for extra $ spent at 100:1	$386,435,902.55
$ spent to date	$5,339,486.38
potential savings	$381,096,416.17
10:1 total for extra $ spent at 100:1	$288,443,826.20
$ spent to date	$0.00
potential savings	$288,443,826.20
total crack	3313
total powder	5954

	1992
1:1 total for extra $ spent at 100:1	$436,000,349.00
$ spent to date	$42,124,355.00
potential savings	$393,875,994.00
5:1 total for extra $ spent at 100:1	$321,762,387.00
$ spent to date	$25,435,963.00
potential savings	$296,326,424.00
10:1 total for extra $ spent at 100:1	$252,526,118.00
$ spent to date	$17,033,345.00
potential savings	$235,492,773.00
total crack	2504
total powder	7272

	1991
1:1 total for extra $ spent at 100:1	$628,062,707.42
$ spent to date	$79,182,883.79
potential savings	$546,879,823.63
5:1 total for extra $ spent at 100:1	$507,413,295.74
$ spent to date	$58,611,223.72
potential savings	$448,802,072.02
10:1 total for extra $ spent at 100:1	$461,041,990.87
$ spent to date	$48,746,284.18
potential savings	$412,295,706.69
total crack	2363
total powder	2297

	1990
1:1 total for extra $ spent at 100:1	$672,508,309.00
$ spent to date	$154,474,875.00
potential savings	$518,033,434.00
5:1 total for extra $ spent at 100:1	$557,731,770.00
$ spent to date	$110,295,658.00
potential savings	$447,436,112.00
10:1 total for extra spent at 100:1	$508,404,656.00
$ spent to date	$94,790,285.00
potential savings	$413,614,371.00
total crack	2706
total powder	4260

	1989
1:1 total for extra $ spent at 100:1	$354,978,175.00
$ spent to date	$88,434,736.00
potential savings	$266,543,439.00
5:1 total for extra $ spent at 100:1	$297,045,185.00
$ spent to date	$64,445,126.00
potential savings	$232,600,059.00
10:1 total for extra spent at 100:1	$267,895,797.00
$ spent to date	$55,615,754.00
potential savings	$212,280,043.00
total crack	1422
total powder	4841

	1988
1:1 total for extra $ spent at 100:1	$54,141,692.00
$ spent to date	$18,378,027.00
potential savings	$35,763,665.00
5:1 total for extra $ spent at 100:1	$45,631,680.00
$ spent to date	$12,852,369.00
potential savings	$32,779,311.00
10:1 total for extra $ spent at 100:1	$41,254,920.00
$ spent to date	$11,154,175.00
potential savings	$30,100,745.00
total crack	243
total powder	1148

EXPLANATION OF STATISTICAL METHODOLOGY

Introduction:

Our calculations were primarily based upon data provided to us by the University of Michigan Consortium, a clearing house for the US Sentencing Commission's databases. The database we used is called ICPSR 9317, and it contains data concerning federal sentencing (prisoner by prisoner) for the years 1987-1992.

The database, and the corresponding US Sentencing Commission reports from 1987 through 1990 compiled many statistics on the amount of sentence given to each drug related offender by crime and by race. However, the data was organized by General Offense Category, so that all drug crimes were grouped together, and then by Offense Type within that category (i.e. trafficking, possession, or importation). Drug Type (cocaine powder or cocaine base (Crack) was not specified, and had to be calculated based upon the fields of information given in the database: weight of drug, length of sentence, and involvement of weapon.

The 1991 data was less complete than the other years, and it was impossible to calculate crack and powder offenses from the information given.

The 1992 database distinguished between cocaine base and cocaine powder, but the weight was not given. The weight was calculated backwards from the formula we used for the first 3 databases.

No raw data could be provided to us from the University of Michigan Consortium for the years 1993, 1994, and 1995. The figures for these years have been mathematically interpolated and extrapolated based upon the race breakdown and quantity of each crime committed.

1987-1990 METHODOLOGY

First all cocaine offenders were separated from the database. By comparing the weight of the drug and the length of sentence (taking into account whether or not there was a weapon used) crack and powder cases were properly labeled. To allow for other aggravating circumstances, if the sentencing base level that the prisoner deserved at a 1:1 base:powder ratio was within 4 base levels of the actual sentence, then the record was treated as if it were a powder offense. Only if the base levels were more than 4 levels apart was the record labeled as a base offense.

Determining Crack or Powder:

The raw data used from the database fell within six general categories. First is COCAA which gives weight values, and second is COCAW which assigns a unit of measure. Combined, these two columns give a weight in units of cocaine. The units of cocaine were then all converted into Kilograms so that we had uniform figures in the amount of cocaine category.

Proposed Base Level:

Proposed base level was determined from the actual weight of the drug and how that correlated to what the Sentencing Guidelines recommend as a base level for that amount of drug. We assigned the proposed base levels at 1 to 1, 5 to 1, and 10 to 1, with the assumption that they were actually sentenced at 100 to 1.

Actual Base Level:

Actual base level was determined by comparing the length of sentence actually given to the range of months at each base level. When the length of sentence fell within a range, that base level was assigned.1

Adjustment to Actual Base Level For Aggravating Base Level Increase:

Under the Sentencing Guidelines Section 2D1.1(b)(1), if there is a weapon present in the commission of the crime, an increase of two base levels is recommended. If a weapon was present for each prisoner, we therefore subtracted two base levels from our estimated base level to closer approximate what we believe they were actually sentenced under. This category then equaled a final estimated adjusted base level at which each prisoner was sentenced.

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1 In the database, 996, the identifier for life imprisonment, was replaced with 300 months which equals 25 years.

Compare Actual Base Level to Proposed Base Level: "Crack or Powder?"

Comparing the actual base level to the proposed base level equaled a difference in the base levels. The difference between actual 100 to 1 sentencing and the proposed base level sentencing at 1 to 1 was quite drastic for some prisoners, and approximately equal for others.2 If the difference in base levels between the actual and proposed was greater than 4, we determined the drug to be CRACK. If it fell within 4 base levels, we determined the drug to be POWDER.3

Accounting for Prisoners Where Weight of Drug is Not Available:

All of the prisoners that did not have an actual amount of cocaine were assigned an approximate amount of cocaine based upon this scale:

(1)	Very small scale	=	10 to 21 months	Ave. base = 13
(2)	Small scale	=	22 to 33 months	Ave. base = 17
(3)	Medium scale	=	41 to 51 months	Ave. base = 21
(4)	Large scale	=	52 to 78 months	Ave. base = 25
(5)	Very large scale	=	79 to 151 months	Ave. base = 30
(6)	Extreme large scale	=	152 to 293 months	Ave. base = 36

Conversion of Proposed Base Level Into Months:

For purposes of converting proposed base level into proposed base level in months, the average number of months from the guideline at that base level were used (Criminal History Category I was assumed). For example, the range of sentences at base level 38 is 235 to 193 months. Base level 38 was therefore assigned an average proposed sentence of 214 months.

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2 Actual base level at 100 to 1 was always compared to proposed base level at 1 to 1 for purposes of determining whether the drug was crack or powder cocaine.

3 A range of plus or minus four base levels will account for some differences in Criminal History Category sentencing levels, thereby determining small discrepancies as powder instead of crack.

Difference in Months Between Actual and Proposed Sentencing:

The difference in months is the difference between the number of months each prisoner was actually sentenced to, and the number of months that each prisoner should have been sentenced to at 1:1, 5:1, or 10:1 (base:powder). This difference in months is the total number of months that will be needlessly served. The difference in months is multiplied by the rising monthly cost of confining a prisoner (based upon figures in each database and figures published by the Bureau of Prisons in the "Fact Card, December 1994"), to calculate the total money wasted due to sentencing base(crack) criminals at 100:1.

Cost of Confinement:

This study assumes that the amount of time sentenced is the will be the time actually served, for the purposes of calculation. It is possible to formulate the cost of community confinement and cost of supervision, however, this task would be nearly insurmountable.

Actual cost of confinement was not available for 1995 and future years, and these figures were estimated based upon the increase of confinement costs in previous years, 7.8% per year.

Determining the Racial Breakdown:

Statistical racial breakdowns were generated for base(crack) and powder cocaine convictions by whites, blacks, Hispanics, and others.

METHODOLOGY FOR 1992 DATABASE

Although data on the type of drug is available, data on amount of drug was missing from this database. In the first three databases, we used amount of drug to determine many factors including the base level at which they were sentenced and the base level at which we propose they should have been sentenced.

To solve for this missing data, the weight ranges for each base level were estimated. Base level for each prisoner was computed using the guideline range each prisoner was sentenced under. Combining the base level of sentence with a determination of either powder or crack cocaine, we were able to determine the range of amount of drug the prisoner possessed. The range of weights were then averaged and assigned each prisoner that number for their amount of drug. This figure was substituted for the Weight in Kilos column, and the model was computed as for the 1987 through 1990 years.

1991, 1993, 1994, 1995 METHODOLOGY

The grand total figures for 1993 and 1994 had to be extrapolated because we did not have access to the raw databases. We did have annual reports to the Sentencing Commission for those years, however, the manner in which those figures were tallied did not allow us to break them down into the raw data we needed for computation. Our extrapolations are therefore calculated upon actual crime statistics.

The 1991 database was interpolated for similar reasons. While we did have the actual database, in 1991 the database did not contain information on weight of drug or crack vs. powder by prisoner. Without either of those figures, it would be impossible to compute an equivalent base level, and then convert that into a proposed base level.

Note:

The 1993 to 1995 potential savings columns are extrapolated. The numbers in the potential savings column reach a point (at the date of enactment of the U.S. Sentencing Commission's recommendation) where there is no money that has been needlessly spent in the past. For this reason, the **extra money spent** and **potential savings** equal each other in the later years.

Mr. SCOTT. Mr. Cullen, we have an anomaly that the way these mandatory minimums work, somebody with a little bit of crack will get more than the higher-up distributing a lot of powder from which the crack is made. Shouldn't we punish the people higher up more seriously than the people lower down?

Mr. CULLEN. There are two parts to your question.

I agree that—if your question presupposes that the penalties for powder cocaine are too lenient, I agree with you and I would endorse, as I said in response to the chairman's question, that the time that people are serving, or most are getting, suspended sentences, be looked at and increased, because they are a tremendous problem to the country.

But I endorse what Assistant Attorney General Harris said, and that is, in my view, you have to look at a gang as a gang and each part of that gang is playing a vitally important role, and I don't have sympathy for what is called the low-end member of that gang if he knows what he is involved with.

Mr. SCOTT. The problem we have, though, is if you take him out, somebody is going to fill his place rather quickly, so you haven't done society much good.

Mr. CULLEN. Two responses, and I will try to be short. If you recall the Assistant Attorney General's testimony, it is only anecdotal and statistics don't bear out that our prisons are filled with young black males under the age of 21 who have not been involved in anything but running a little errand one time. That is not true with regard to Federal prosecutions. They are part of conspiracies and they have been convicted of knowing what they were doing.

It is only the exception, and the exceptions are troublesome, but the system is not ill, I don't believe, with regard to the distribution and the punishment for that distribution of crack cocaine.

Mr. SCOTT. We have evidence from the Bureau of Prisons that 21 percent of the prisoners have no record of current or prior violence, no involvement in sophisticated criminal activity, no prior commitment; 21 percent fit that category.

Mr. CULLEN. But that is different than saying 21 percent are in only because of a minor offense. Those 21 percent, with the exception of maybe a very, very few, which—I used the description "anecdotal stories"—have done something terribly wrong, and people have died because of that enterprise.

As you know, in our district, in Richmond and Portsmouth, there is death, murder and intimidation to further these enterprises.

Mr. SCOTT. We also know in our jurisdiction we have an incarceration rate that is so high at this point that spending additional money to lock up anybody any longer than we have them has to be subjected to some cost-benefit analysis. We have had testimony from others that lengthening the sentence doesn't do anything to reduce recidivism, and the question is how people are deterred with the kinds of sentences that we are giving out now.

I have serious questions as to whether or not—let me ask Dr. Fagan. Is there any research that shows that stretching these sentences out from 1- to a 10-year mandatory minimum reduces the amount of cocaine that people use?

Mr. FAGAN. Users—you mean——

Mr. SCOTT. Either one.

Mr. FAGAN. By our data, no, we have not seen it. At some point, the risks of rearrest actually increase with longer sentences after we control for other factors, including prior drug involvement, type of drug, and so on, the longer that one is sentenced to prison.

Mr. SCOTT. Say that again.

Mr. FAGAN. The risks of rearrest actually increase the longer that one is sentenced to prison.

Mr. SCOTT. And so lengthening the sentence has increased recidivism?

Mr. FAGAN. It increases the risk of recidivism. The likelihood increases with the length of time they spend in prison for either use or sale of cocaine or crack.

Mr. SCOTT. Is that isolating out the fact that people who get longer sentences are probably more guilty?

Mr. FAGAN. Yes.

Mr. SCOTT. You isolate that out?

Mr. FAGAN. Yes. It is isolated out in terms of controlling for severity of prior criminal record, prior drug selling, age, whether or not there was a violent offense accompanying the distribution or the sale or the use, whatever other factors we felt were salient with respect to their involvement in drugs.

There is a statistical point to be made also, which is that when you analyze samples of the size that we did, which were 23,000 cases in one study and 6,000 cases in another, questions of those kinds of sampling biases those tend to get washed out. In other words, yes, we did control for all the possible correlates that might——

Mr. SCOTT. I would say that is consistent with what we heard last year from the Director of the Bureau of Prisons. If you want to reduce recidivism, you give education in prison; you get a lot better deal for your money.

Mr. FAGAN. Or drug treatment and prison.

Mr. SCOTT. Does anyone else want to comment?

Dr. McDonald, have you done research in this area?

Mr. MCDONALD. Well, I think that you can look at the trend, the numbers in here, that the length of sentences for cocaine distribution has gone up hugely between 1986 and 1995. I haven't seen a rapid decline in the use of crack that one could attribute to that.

Now, obviously, it is hard to infer what would have happened had those increases not have occurred. Just prima facie, it is hard to see a deterrent effect here.

Mr. SCOTT. Could Dr. Kleber?

Dr. KLEBER. Yes. I think we need to be very careful with these statistics, and especially the anecdote. I have often said, the plural of anecdote is not data, and yet anecdote seems to always carry the day even though one can usually come up with an opposing anecdote.

In terms of what has come up in the last 5 minutes or so, I haven't heard anyone come out, when I hear that what we are doing isn't working: on the contrary the homicide rate is going down, crack use in our major cities is declining. One could attribute that to a variety of causes. One could say, the cocaine epidemic has peaked and is going down. One could say that we have locked up

a lot of the potential individuals who were involved in the dealing. Or we can talk about an age cohort.

But in any event, I think the data is reasonably good that there has been a decline in both the homicide rate and in crack initiation. So to say that our current policies aren't working, is an unwise extrapolation from data that could be interpreted in other ways.

Mr. CULLEN. Mr. Chairman, if I could just add one minor point.

Mr. MCCOLLUM. Certainly.

Mr. CULLEN. The Federal Government is criticized for a lot of things, some rightly, some probably not. But in the area of law enforcement over the past 15 years, there have been tremendous successes because of the policy that the Congress adopted by bipartisan vote. I think Senator Kennedy was probably the author of the mandatory minimum sentence, and it is working well and this would be a tremendous step backwards from that.

Mr. MCCOLLUM. Dr. Curry.

Mr. CURRY. Relative to that point, after my son was arrested, I must have received well over 300 phone calls from people all over the metropolitan area that I had never seen before. What they tell me is, yes, they want to be tough on crime, but they never thought that that kind of a sentence would accompany that kind of behavior, and that is the message I am getting. Having been a high school principal in particular for 12 years in Prince George's County, I can tell you honestly if you walk—and I took this survey in a high school of roughly 1,600 students. I asked over half the students there if they had heard the term "mandatory minimums," if they knew what it meant, if they knew that there is a difference, crack versus powder.

They did not. Kids don't know. They don't know. So using that kind of punishment as a deterrent would not work. Kids don't know.

Mr. MCCOLLUM. I think what we are hearing, Dr. Curry, is the—some people saying that, some people also saying the prosecutors need the leverage to get the data. So we are having a lot of—it has been a very good hearing. I only regret that the day has been broken up as much as it has, because had it not been, you would have had many more Members—not many more, several more; we don't have a huge committee—who would have been questioning you; and I think each of you would have gotten more out to give us.

You have contributed well. The statements have been very beneficial, they have been diverse, but then obviously with a vote by the Sentencing Commission, I am confident that would have been the case had we had any panel of interested parties.

But you have been good because you come from all kinds of experiences and backgrounds that have loaned to your knowledge, and we want to thank you. Most of you come from quite a distance, and I don't think it is fair to attempt to pursue this further because we are going to have a back-to-back vote on the floor of the House. The day is long.

Again, I want to thank all of you for coming. We are going to adjourn the hearing at this point. Thank you very much.

The hearing is adjourned.

[Whereupon, at 3:50 p.m., the subcommittee adjourned.]

APPENDIXES

APPENDIX 1.—STATEMENT OF HON. MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, thank you for this opportunity to share with this subcommittee my concerns and perspectives regarding the important issue of sentencing for persons convicted of possession or sale of crack cocaine and powder cocaine.

All of us are concerned by the spread of drugs in our communities and the violence that often accompanies the drug trade. We must strike back at drugs with effective law enforcement that works hand-in-hand with our communities. We must offer greater social and economic opportunity in order to strike back against the despair and lack of self-esteem that often drives people to a life of drugs.

Above all, we need a justice system that metes out punishment equitably—not one that punishes some offenders more harshly because of their race, their class or because they were involved with one type of drug instead of another.

Mr. Chairman, I am convinced that our justice system is failing this very important test.

According to the National Institute on Drug Abuse, whites accounted for two-thirds of those who tried crack cocaine and constituted a majority of the most frequent users.

Notwithstanding this, African Americans and Latinos account for at least 96 percent of defendants prosecuted for crack offenses in federal courts.

In the U.S. District Court serving Los Angeles County and six others, federal authorities did not prosecute any whites for crack cocaine offenses between 1988 and 1994. Instead, hundreds of white defendants were charged in state courts, where possible sentences are far less than under federal mandatory minimum sentencing. The difference between being charged in state court rather than in federal court can be eight years for the same offense. Blacks and Latinos convicted in federal courts can receive 10 year mandatory minimums while whites prosecuted in state courts face a maximum of five years and often receive no more than a one year sentence.

The *Los Angeles Times* recently contrasted two cases. In one, a Black man was arrested with 70 grams of crack by an undercover DEA agent. He was convicted and sentenced to a 10-year term. A white, arrested with 67 grams of crack in the front seat of his car, was sentenced to less than a year in jail and probation.

This pattern is mirrored nationwide. A 1992 study found that only minorities were prosecuted for crack offenses in federal courts in 17 states and many cities, including cities such as Miami, Dallas, Boston, and Denver.

In 1984, Congress passed the Sentencing Reform Act, intending to reduce the disparity in federal sentences from one judge to another and "toughen up" penalties. Conviction for possession of even five grams of crack means a mandatory five-year prison term. Fifty grams equals ten years.

It is worth mentioning that the federal mandatory minimums for powder cocaine—a more high-class product—are substantially less—five years for 500 grams, 10 years for five kilos. Sentences for powder cocaine are "softer" than those for crack cocaine by a factor of 100 to one.

Many federal judges—judges such as Judge Terry Hatter in Los Angeles, Judge Harold Greene in New York, and Judge Lyle Strom of Omaha—already believe that mandatory minimum sentences, though appealing to a "get tough" mentality, are incompatible with the requirements of justice. This most recent evidence clearly shows a disparity in sentencing between those who are white and those who are African American and Latino that can only heighten our concern.

"Equal justice under the law" cannot simply be a platitude carved into stone above the entrances to the halls of justice. If our system of justice is to be credible to the people of our nation, then we must eradicate such disparities in sentencing

as we've seen in crack cocaine cases. I hope this committee will take seriously the need to rectify this unequal justice.

Thank you.

APPENDIX 2.—STATEMENT OF WADE HENDERSON, DIRECTOR, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, WASHINGTON BUREAU

I. INTRODUCTION AND SUMMARY

Mr. Chairman and Members of the Committee, I appreciate the opportunity to testify before you today on behalf of the National Association for the Advancement of Colored People (NAACP). I am Wade Henderson, Director of the Washington Bureau of the NAACP.

The NAACP is the nations oldest and largest civil rights organization, with over 600,000 members in the 50 states, the District of Columbia, and Europe. The NAACP is committed to the protection of fundamental civil rights under the Constitution for African Americans, and by extension—all persons here in the United States.

The NAACP is also a founding member of the Coalition for Equitable Sentencing, a nonpartisan coalition of over 20 criminal justice, civil and human rights, and religious organizations that have joined together to educate the public and Congress about the unwarranted disparity in cocaine law sentencing.[1] The NAACP and the Coalition for Equitable Sentencing believe that the racial implications and ramifications of current sentencing policies for crack and powder cocaine raise serious questions of equal protection of the law and freedom from disproportionate punishment. We believe that the overwhelming weight of the evidence shows that mandatory minimum sentences for crack cocaine are not medically, scientifically, or socially supportable and unfairly burden the African American community.

The particular provision to which we object is the so-called "100-to-1" quantity ratio between crack and powder cocaine.[2] Under this provision, possession or distribution of five grams of crack carries the same penalty as 500 grams of powder cocaine. Congress passed these laws in 1986 and 1988, making policy based on media hype, without ever taking testimony of cocaine pharmacology, prison capacity, impact on courts and prosecutorial caseloads, or on appropriate sentences for the two forms of the drug.

Despite popular belief that crack is some sort of wonder drug, in fact it is nothing more than the street term for cocaine base. Crack is easily manufactured by heating cocaine hydrochloride or "powder cocaine" with baking soda on a stove top.[3] Yet, despite the similar pharmacology of crack and powder cocaine, the sentences for possession and distribution of crack are 100 times greater than for powder cocaine.

All of the arguments typically advanced in support of this distinction fall apart upon reasoned analysis. Those who continue to oppose the equalization of these mandatory minimum sentences have ignored the medical and empirical evidence that fatally undermines their position and instead have clung to the misinformation disseminated by the media during the past decade.

These media reports cannot and ought not provide the basis for our understanding about crack cocaine, let alone influence our country's federal laws on cocaine sentencing. But they have. For this reason, we applaud the United States Sentencing Commission's unbiased and thorough study of the issue and its Special Report to Congress which, based on the overwhelming weight of the evidence and testimony it received, has recommended that the 100-to-1 quantity ratio be eliminated. The Sentencing Commission also has introduced an amendment to correct this flawed provision. We wholeheartedly endorse this amendment and urge Congress to allow it to take effect.

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[1] In addition to the NAACP, other member organizations of the Coalition for Equitable Sentencing include the American Civil Liberties Union, Americans for Democratic Action, Center for the Study of Harassment of African Americans, Criminal Justice Policy Foundation, Drug Policy Foundation, Families Against Discriminative Crack Law, Families Against Mandatory Minimums, General Board of Church and Society of the United Methodist Church, National Association of Black Social Workers, National Association of Criminal Defense Lawyers, National Black Caucus of State Legislators, National Black Police Association, National Committee Against Repressive Legislation, National Conference of Black Lawyers, National Legal Aid and Defender Association, National Islamic Political Foundation, National Lawyers Guild, National Rainbow Coalition, National Urban League, The Sentencing Project, Southern Christian Leadership Conference, and the Special Committee on Racism and the Drug War.

[2] *See* 21 U.S.C. 844(a) (possession), 21 U.S.C. §§841(b)(1)(A), 841(b)(1)(B) (trafficking), 21 U.S.C. §960(b)(1) & 960(b)(2) (importation), and the Sentencing Guidelines promulgated pursuant thereto.

[3] See U.S. Bureau of Justice Statistics, Dep't of Justice, *Drugs, Crime and the Justice System*, NCJ–133652 181 (Dec. 1992).

This proposed amendment is important not just because it corrects an irrational federal policy. It also serves the critical function of eliminating from our federal statutes a provision that is racially discriminatory. As explained in more detail below, African Americans almost exclusively bear the brunt of this harsh penalty. The fact that the 100-to-1 quantity ratio has such a disparate impact on a racial minority is, by itself, reason to eliminate it from our federal code, particularly given the absence of any compelling—or even rational—government interest in preserving it. In fact, the current policy may perpetuate many of the underlying social problems it is intended to address, by unfairly targeting racial minorities for harsh treatment by the federal government. We therefore urge Congress to allow the Sentencing Commission to do the job it was hired to do and to allow this amendment finally correcting this disastrous policy to take effect.

II. The Disparate Impact of the Policy on African Americans Compels the Conclusion That the Current Policy Is Unfair

The 100-to-1 quantity ratio between crack and powder cocaine should be abandoned because it is irrational and racially discriminatory. Because the current policy burdens African Americans almost exclusively, Congress should eliminate it—even if the policy otherwise were rational. Failure to correct this racially discriminatory policy will serve only to exacerbate many of the problems associated with drug abuse in this country, including lack of respect for the law.

A. THE DISCRIMINATORY EFFECT OF THE 100-TO-1 QUANTITY RATIO IS STAGGERING

On February 28, 1995, the Sentencing Commission released a thorough and meticulously prepared report on the disparity in the sentencing of crack and powder cocaine defendants. The Report stated that "[f]ederal sentencing data leads to the inescapable conclusion that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine."[4] The Report disclosed that in 1993, 88.3% of those sentenced federally for crack offenses were African American, while only 4.1% were white.[5]

What makes this statistic particularly alarming is that whites comprise a much higher proportion of crack users in this country than African Americans. In fact, 64.4% of crack users are white (2.4 million), while about 26.6% are African American (990,000), and 9.2% are Hispanic (348,000).[6]

Moreover, although the National Household Survey on Drug Abuse reports that 91% of those who had used cocaine in 1990 sniffed or snorted it—as compared with 31% who smoked it[7]—and that the greatest number of documented crack users are white,[8] the "war on drugs" has been disproportionately targeted at inner city Black communities. This has caused an overwhelming number of prosecutions directed against the 31% who smoke cocaine in crack form, resulting in a vastly disproportionate number of African Americans convicted and incarcerated.

As a result of these discriminatory effects, African Americans increasingly spend many more years of their lives in jail for cocaine-related offenses than whites. A Department of Justice commissioned study on federal sentencing policies found that between 1986 and 1990, both the rate and average length of imprisonment for federal offenders increased for African Americans in comparison to whites, and that the higher proportion of African Americans charged with crack offenses was "(t)he single most important difference accounting for the overall longer sentences imposed on Blacks, relative to other racial groups."[9] The study's analysis concluded that:

> If legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study's analysis suggests that the Black/White difference in sentences for cocaine trafficking would not only evaporate but would slightly reverse.[10]

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[4] *See* U.S. Sentencing Comm'n Special Report to Congress, *supra* note 3, at xi.
[5] *See* U.S. Sentencing Comm'n Special Report to Congress, *supra* Table 13, Race of Drug Trafficking Defendants, (Oct. 1, 1992 through Sept. 30, 1993).
[6] *See* Nat'l Inst. for Drug Abuse, *Nat'l Household Survey on Drug Abuse, Population Estimates 1991* Table 5–B, 5–C, 5–D (Nov. 20, 1992).
[7] *See* U.S. Bureau of Justice Statistics, *supra* note 2, at 24.
[8] *See* Nat'l Inst. for Drug Abuse, *supra* note 31.
[9] *See* U.S. Bureau of Justice Statistics, Dep't of Justice, Office of Justice Programs, *Sentencing in the Federal Courts: Does Race Matter?* (Nov. 1993); *see also* U.S. Sentencing Comm'n Special Report to Congress, *supra* note 3, at 162.
[10] *Id.* at 2.

B. ANY GOVERNMENT POLICY THAT HAS SUCH A DISPARATE IMPACT ON A RACIAL MINORITY SHOULD BE SUBJECT TO HEIGHTENED SCRUTINY BY LEGISLATORS

A fundamental principle of any democracy in which racial or ethnic minorities currently suffer—or historically have suffered—racial discrimination should be that every government policy that has a disparate impact on a racial minority should be subjected to heightened scrutiny by the legislators. The Sentencing Commission heeded this basic principle when it concluded that it was not sufficient simply to determine whether the 100-to-1 quantity ratio was enacted with a racially discriminatory intent; instead, the Commission stated that its "evaluation of the fairness of current penalties must go beyond ensuring that the rules are racially neutral."[11]

Affording heightened scrutiny to sentencing provisions that burden racial minorities disproportionately is consistent with Congress' intent in adopting the guidelines almost a decade ago. The Sentencing Guidelines were promulgated with the express purpose of providing certainty and fairness in sentencing and to eliminate unwarranted sentencing disparities.[12] The Commission was commanded to "assure that the guidelines and policy statements are entirely neutral as the race, sex, national origin, creed, and socioeconomic status of offenders."[13] The problem facing Congress now, however, is that a provision which appears racially neutral on its face, in fact has a substantial racially discriminatory effect.

Most equal protection challenges to the 100-to–1 quantity ratio have failed in the federal courts because, under current federal equal protection analysis, a statute will be subjected to strict scrutiny only if it can be shown that the legislature enacted the particular statute "because of," not merely "in spite of," a racially discriminatory effect.[14] However, the mere fact that a statute may not be unconstitutional under prevailing jurisprudence does not mean that the statute makes good sense. Government should not be indifferent to the racially discriminatory effects of its policies. Instead, it should seek to eliminate the racially discriminatory impact of all government policies that harm racial minorities, regardless of whether the policy was adopted with the best—or worst—of motives. As one commentator has described succinctly, it makes no difference, from the perspective of the individual who suffers the discriminatory harm, whether the harm was inflicted intentionally or with utter indifference:

> [M]inorities can also be injured when the government is "only" indifferent to their suffering or "merely" blind to how prior official discrimination contributed to it and how current acts will perpetuate it . . . . If the government is barred from enacting laws with an eye to invidious discrimination against a particular group, it should not be free to visit the same wrong whenever it happens to be looking the other way. If a state may not club minorities with its fist, surely it may not indifferently inflict the same wound with the back of its hand.[15]

The Minnesota Supreme Court adopted this reasoning when it rejected the State's argument that the crack/cocaine classification legitimately served to facilitate prosecution of "street level" dealers or that such disparate treatment was necessary because of the alleged more addictive and dangerous nature of crack. The Minnesota Supreme Court stated:

> There comes a time when we cannot and must not close our eyes when presented with evidence that certain laws, regardless of the purpose for which they were enacted, discriminate unfairly on the basis of race—that in Minnesota, the predominately black possessors of three grams of crack cocaine face a long term of imprisonment with presumptive execution of sentence while the predominately white possessors of three grams of powder cocaine face a lesser term of imprisonment with presumptive probation and stay of sentence. [16]

While a state, such as Minnesota, certainly bears the responsibility to assess honestly and responsibly the racial implications of the statutes that it passes and the punishment that it metes out to its citizens, Congress has a special obligation to ensure that, in the absence of a compelling government interest, the laws by which it seeks to bind an entire nation are neutral with respect to their impact on racial

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[11] *See* Statement of the Comm'n Majority, *supra* note 15, at 6.
[12] *See* 28 U.S.C. § 991(b)(1)(B).
[13] 28 U.S.C. § 994(d).
[14] *See McClesky* v. *Kemp*, 481 U.S. 279, 298 (1987).
[15] *See* Laurence Tribe, *American Constitutional Law*, 1518–19 (2nd ed. 1988).
[16] *See Russell, supra* note 21, 477 N.W.2d at 886.

minorities in purpose, as well as effect. Regardless of the standard a court might apply to such discriminatory effects, Congress should weigh them heavily in its policy-making decisions.

C. THIS RACIALLY DISCRIMINATORY POLICY MAY ACTUALLY CONTRIBUTE TO UNDERLYING SOCIAL PROBLEMS

Far from serving a compelling governmental interest, this 100-to-1 quantity ratio actually may contribute to the social problems that it was intended to cure. Any government policy that has, as its effect, the singling out of a racial minority for negative treatment or otherwise places burdens upon that group from which other racial groups remain free, inevitably breeds distrust of the government, cynicism, and lack of respect for the law.

All of these consequences—particularly when combined with the pressures and indignities of poverty, racism, failed school systems and deplorable living conditions—contribute to the growing sense among African Americans, as well as other racial minorities, that because the criminal justice system as well as other government institutions often seem utterly indifferent to their interests, there is no point in attempting to participate in the American democracy or, in the view of a disturbing number of young people, legal economies.

The belief that the criminal Justice system operates in a racially discriminatory manner is not far-fetched or unfounded. To the contrary, the evidence is overwhelming that the criminal justice system often unfairly targets African Americans and their communities for surveillance, investigation, prosecution, and harassment. For example, the decision whether a crack offender will be prosecuted in state or federal court has, in certain areas, produced a bifurcated approach in which African Americans are prosecuted in federal court and whites are prosecuted predominantly in state court, where the penalties are much less severe.

An investigation by the Los Angeles Times found that in Los Angeles County and the six surrounding counties not a single white person has ever been convicted in federal court of a crack offense since 1986, when Congress enacted mandatory minimum sentences for crack-related offenses. This is the case despite the fact that, as described above, the majority of crack users are white. Moreover, in Los Angeles County alone, during the period from 1988 to 1994, hundreds of white crack offenders were convicted in state court, while, during the same period, federal authorities did not prosecute any white crack offenders.[17]

In defense of their practices, federal authorities assert that, given the reality of limited enforcement resources, they must focus on dealers in minority communities, where the crack trade is particularly violent and destructive and that, by focusing on minority communities, they are able to concentrate their efforts on prosecuting major crack traffickers. Contrary to the government's assertions, however, the evidence indicates that the majority of federal crack defendants are not major distributors or kingpins; instead, most are low-level dealers, lookouts, and couriers. In fact, a Sentencing Commission survey of 146 federal crack prosecutions found that only eight involved high-level dealers.

Many experts have become increasingly skeptical that the targeting of impoverished African American communities for law enforcement efforts actually furthers the "war on drugs" in any meaningful respect. They recognize that because cocaine dealers in these communities have few alternative means of producing income, the imprisonment of one drug dealer simply opens a niche for a new dealer.[18] In fact, some commentators have concluded that such police procedures substantially add to cocaine related violence. As one expert observed:

> Intensified law enforcement efforts probably contribut[e] to increased levels of violence. Street sweeps, neighborhood saturation, buy-bust operations and the like lead to increased violence in a number of ways. For example, removing dealers from their established territory by arresting them creates a vacuum that other dealers fight to fill. By the time these hostilities have ended, convicted dealers may have returned from prison and attempted to reassert their authority, resulting in a new round of violence.

Federal officials also defend their practices on the ground that white offenders often do not sell large enough quantities to qualify for federal prosecution. However, federal enforcement efforts frequently employ a tactic known as "bargaining-up,"

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[17] The Los Angeles Times reports that one white defendant was recently indicted and currently awaits trial.

[18] *See* M. Kleiman and K. Smith, *State and Local Drug Enforcement: In Search of a Strategy* 71 (1990).

which involves repeated solicitations until the quantity crosses the 50-gram threshold, triggering the ten year mandatory sentence. Defense attorneys assert that a disproportionately high number of African American offenders are "bargained-up" through repeated undercover transactions. Additionally, the use of "bargaining-up" brings into question the federal government's assertion that it seeks to go after the major traffickers; "bargaining-up" an offender several times to reach the 50-gram threshold casts doubt on whether an offender is truly a major distributor.

Clearly, the failure of federal officials who are charged with investigative and prosecutorial responsibilities to exercise consistently their discretion in a racially neutral manner highlights the critical need for the penalties between crack and powder cocaine to be equalized, because the biased exercise of prosecutorial discretion serves to increase the discriminatory effects of the 100-to-1 quantity ratio. While discrimination against racial minorities in any form is deplorable, it is particularly dangerous in our criminal justice system. Elimination of the 100-to-1 quantity ratio will be an important step in the development of a fair and reasonable national drug policy.

III. Legislative History

Influenced by media hype and erroneous assumptions about crack, Congress enacted The Anti–Drug Abuse Act in 1986 ("1986 Act"). The 1986 Act created the first distinction between crack and powder cocaine. It also created the basic framework of mandatory minimum penalties that currently apply to federal drug trafficking offenses. The 1986 Act established two classes of mandatory minimum sentences. For the highest level traffickers, a minimum ten year sentence, without parole, was provided for participating in the manufacture, distribution or conspiracy to manufacture or distribute five kilograms of cocaine (approximately eleven pounds, now worth approximately $100,000 wholesale). For mid-level cocaine distributors, a five year minimum was set for 500 grams (a little more than one pound, about $10,000 wholesale). For crack cocaine, however, the ten year minimum was set for only 50 grams of crack—less than two ounces, and the five year minimum was set for five grams—about the weight of two pennies. These quantity thresholds in the 1986 Act created the 100-to–1 sentencing ratio between crack and powder cocaine.

Unfortunately, the 1986 Act was expedited through Congress, and its passage left behind a very limited legislative history. Although many individual members delivered floor statements about the Act, Congress dispensed with most of the typical legislative process, including committee hearings and committee analysis of the Act's provisions. The legislative history of the 1986 Act contains no discussion of the rationale for the 100-to-1 sentencing ratio between crack and powder cocaine.

Mr. Eric Sterling, former counsel to the House Judiciary Subcommittee on Crime and significant participant in the development of many provisions of the 1986 Act, testified before the United States Sentencing Commission in 1993 regarding the political climate under which the 1986 Act was passed. He explained that the overdose death of NCAA basketball star Len Bias focused tremendous national attention on cocaine and led politicians to react hastily and emotionally. Mr. Sterling described Representatives filling the Congressional Record with articles of "crazed black men killing innocent people while on cocaine." He quoted Senator Chiles as stating, "I doubt America can survive crack." Senator Gramm, Mr. Sterling continued, added an amendment sentencing imprisoned cocaine possessors to twice the amount of time they would have received had they possessed a grenade instead. Thus, in this climate, Congress composed in thirty days, with no hearing and little debate, the troubling 100-to–1 sentencing ratio between crack and powder cocaine.

In 1988, Congress enacted an amendment to the 1986 Act that made crack cocaine the only drug with a mandatory minimum penalty for a first offense of simple possession.[19] Until this time, the penalty for simple possession was the same regardless of the drug possessed—a misdemeanor with a maximum of one year imprisonment for a first time offender. The 1988 Amendment set a mandatory minimum felony penalty of five years for a first time offender's simple possession of more than five grams of crack cocaine.[20] The maximum one year penalty for a first offense remained the same for possession of any other form of cocaine, however. Thus, Congress extended the 100-to-1 sentencing ratio between crack and powder cocaine to simple possession as well as distribution.

[19] Title V, § 6371 of Pub. L. No. 100-690, 102 Stat. 4370, amended 21 U.S.C. § 844(a).

[20] A mandatory minimum sentence of 5 years and a maximum of 20 years was established for possession of: 5 grams of crack for a first conviction; 3 grams for a second conviction; 1 gram for a third conviction. *See* 21 U.S.C. § 844(a).

Interestingly, the bill for the 1988 Amendment did not contain these mandatory minimum penalties for possession of crack cocaine when it was originally introduced in Congress. These penalties were added in floor action in both the House and Senate.[21] Once again, relatively little debate surrounded the proposals to attach mandatory minimum penalties to simple possession of crack cocaine.

On October 13, 1993, Representative Charles Rangel (D–NY) introduced the "Crack-Cocaine Equitable Sentencing Act of 1993" (H.R. 3277) to eliminate the cocaine sentencing disparity by making the sentences of those convicted of crack cocaine offenses equivalent to those convicted of powder cocaine offenses. This legislation was later incorporated into "The Crime Prevention and Criminal Justice Reform Act" (H.R. 3315), was introduced in the 103rd Congress, and was offered by Representative William Hughes (D–NJ) as an amendment to "The Violent Crime Control and Law Enforcement Act" (H.R. 3355). The original Hughes amendment, however, was replaced with a provision adopted unanimously by the United States House of Representatives and later signed by President Clinton as part of the 1994 Crime Bill. The provision directed the Sentencing Commission, a bipartisan, independent agency in the judicial branch, to study the issue and to submit a report to Congress by the end of the year on the unequal penalty levels for powder and crack cocaine.[22] Representative Rangel reintroduced the "Crack-Cocaine Equitable Sentencing Act" (H.R. 1264) in the 104th Congress.

After meticulously examining the facts surrounding the cocaine sentencing disparity, the Sentencing Commission issued its Special Report to Congress, "Cocaine and Federal Sentencing," on February 28, 1995. Although the Commissioners unanimously agreed that the disparity between sentences for crack and powder cocaine was far too great and should be reconsidered, the Commissioners declined to submit specific recommendations to Congress as to what the ratio should be, stating that they would do so by May 1996. The Commission subsequently resolved to move that date up one year and, on May 1, 1995, submitted to Congress its recommendations regarding "retention or modification" of the sentencing policy between differing forms of cocaine. The Commission stated that it:

> [u]nanimously agrees that the current 100-to-1 quantity ratio [between crack and powder cocaine] found in the mandatory minimum penalty statutes, and replicated in the current sentencing guidelines, cannot be recommended and should be changed. Further, the Commission unanimously believes that the current five-year mandatory minimum for simple possession of crack cocaine should be reconsidered.[23]

In addition, the Commission transmitted to Congress an amendment to its sentencing guidelines to equalize the penalties between crack and powder cocaine and recommended that Congress equalize the statutory cocaine penalties. This guideline amendment will go into effect November 1, 1995, unless Congress opposes it. The Commission also submitted to Congress proposed legislation, "The Cocaine Penalty Adjustment Act of 1995," to harmonize the crack penalty statutes with the guideline amendments.

The Commission's bill essentially parallels the Rangel bill, as it provides that the penalty for simple possession and trafficking in crack and powder cocaine should be equal.

IV. Impact of the Media

As the Sentencing Commission's Special Report to Congress explained, the media has played a significant role in creating the misperception that crack is more dangerous than powder cocaine.[24] Media reports about crack cocaine began surfacing in late November 1984. The Los Angeles Times was the first to refer to a "cocaine rock that was appearing in the barrios and ghettos of Los Angeles" on November

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[21] *See* 134 *Cong. Rec.* H7, 704 (daily ed. Sept. 16, 1988) (statement of Rep. Shaw); 134 *Cong. Rec.* S17,320 (daily ed. Oct. 21, 1988) (statement of Sen. Helms).

[22] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 2096 § 280006.

[23] *See* Letter from Richard Conaboy, Chairman, United States Sentencing Commission, to the Honorable Orrin Hatch, Chairman, Senate Judiciary Committee, May 1, 1995; *see also* U.S. Sentencing Comm'n Special Report to Congress, *supra* note 3.

[24] *See* U.S. Sentencing Comm'n, *Cocaine and Federal Sentencing Policy* 121–23 (Feb. 1995) (hereinafter, "U.S. Sentencing Commission Special Report to Congress"); *see also* Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 Wash. U.J. Urb. & Contemp. L. 121, 139 (1994).

25, 1984. Other reports that year spoke of the "increasing popularity of crack cocaine."

Within a two year period, more than 1000 stories about crack cocaine appeared in the national press, of which ten were cover stories for Time magazine or Newsweek. In that same period, NBC news ran 400 separate reports on crack for a total of 15 hours of air time. This publicity gained crack labels such as the "issue of the year" (reported in Time magazine on September 22, 1986), the "biggest news story since Vietnam and Watergate" (reported in Newsweek on June 16, 1986), and the "most dangerous drug." The press even went so far as to declare the outbreak of a "national crack epidemic."

Many of the assertions made by the media proved false. Indeed, the picture of crack painted by the media bears little resemblance to reality. For example, a 1986 news story reported that crack was "America's Drug of Choice" when in fact statistics showed that snorting cocaine was still the preferred method of ingestion by 95% percent of cocaine users.

Another example of the media's inaccurate reporting on this subject was the coverage surrounding the death of University of Maryland basketball star Len Bias in June 1986. Bias future seemed bright in June 1986; he was the first-round draft pick of the Boston Celtics. Not long after signing with the Celtics, however, Bias collapsed and then died from a cocaine overdose.

A toxicologist in Maryland's Medical Examiner's Office said that a vial found at the scene "probably was not crack." The chief medical examiner at the same office reported that Bias had likely snorted cocaine because residue of the drug had been found in his nasal passages. Nevertheless, major newspapers across the country—The Los Angeles Times, USA Today, The Chicago Tribune, The Atlanta Constitution, and The Washington Post—ran headlines quoting the one medical examiner in Maryland's Medical Examiner's Office who concluded that Bias had "probably died from free-basing cocaine."[25] In the month after Bias death, there were 74 broadcasts on the evening news about crack cocaine, many of which were fueled by Bias supposed crack overdose.

Brian Tribble was criminally charged with supplying Bias with the fatal dose of cocaine. Testimony at his criminal trial, a year after Bias' death, clearly established that Bias had in fact died from snorting powder cocaine, not free-basing crack. Again, the media had gotten it wrong.

V. The Sentencing Commission Correctly Determined That the Mandatory Minimum Penalties for Cocaine and Crack Should Be Equalized

We agree with the Sentencing Commission's unanimous conclusion that the current 100-to-1 quantity ratio between powder and crack cocaine is unjustifiable and should be repealed. We also endorse the Sentencing Commission's amendment to the sentencing guidelines that would eliminate the disparity in punishment for possessing and trafficking in these two different forms of the same drug. None of the arguments advanced in support of a disparity in punishment between those who possess or sell one form of cocaine versus another can withstand scrutiny.

A. CRACK DOES NOT POSE A GREATER HEALTH RISK TO THE PUBLIC

The Justice Department has declined to defend the current 100-to–1 disparity between crack and powder cocaine, but has indicated that some unspecified disparity in punishment between the two drugs might be appropriate, in part, because crack supposedly is more psychologically addictive than cocaine. While this view is consistent with the misinformation disseminated by the media on this subject, it is not supported by scientific evidence.

As the Sentencing Commission discovered when studying dispassionately the alleged differences between crack and cocaine, "the picture of crack painted by the media b[ears] little resemblance to the reality portrayed by scientific research on the subject." Scientists such as Charles Shuster, M.D., the director of the National Institute on Drug Abuse under President Reagan, have confirmed that "cocaine is cocaine, whether you take it intranasally, intravenously, or smoked."[26]

In issuing its Report to Congress, the Sentencing Commission specifically noted that cocaine in any form produces the same physiological and psychological effects. It is the onset, intensity, and duration of the effects which vary, and these vari-

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[25] Maryland's Assistant Medical Examiner, Dr. Dennis Smyth, based his conclusion on the fact that there were high concentration levels of cocaine in Bias's bloodstream.

[26] *See* Crack Cocaine: Hearing Before the U.S. Sentencing Comm'n 112 (Nov. 9, 1993) (testimony of Charles Shuster, M.D.); *see also*, CBS Eye to Eye with Connie Chung (Sept. 16, 1993) (interview with Dr. Charles Shuster).

ations are tied to how the drug is administered—not to any differences in chemical make-up of the drug. Cocaine can be smoked when in crack form, snorted when in powder form, or injected with a hypodermic needle when dissolved in water. Psychotropic effects can be reached within one minute after smoking crack (with the "highs dissipating after approximately 30 minutes); 4 minutes after injecting powder cocaine (with the effect also lasting 30 minutes); and 20 minutes after snorting powder cocaine. The high from snorting cocaine, however, lasts for 60 minutes—twice as long as from injecting or smoking crack.

As the Sentencing Commission's Report to Congress emphasized, both powder and crack cocaine carry a risk of addiction. Although there is little evidence that one method of ingestion is more addictive than another, many experts have argued that powder cocaine poses a much greater health risk to the American public than crack. For example, Dr. George Schwartz, an expert in pharmacology and toxicology of drugs, has testified that although no method of ingestion is more addictive than another, intravenously-injected cocaine—not smoked cocaine—is the leading cocaine-related threat to both the user and society. He reports that at least three times as many deaths are reported from snorting cocaine than from smoking it.[27] It is also well established that heart and lung problems are more common among powder cocaine users and that, from a public health perspective, injecting cocaine creates an enormous risks of infections, including HIV and hepatitis.[28]

Over the years, the specter of a generation of "crack babies" also has been used to justify the disparate cocaine penalties. Studies, however, have indicated that the "crack baby" scare has been overblown. Many of these infants suffer as a result of other social factors such as community violence, malnutrition, other drug usage, and inadequate health care.[29] In fact, as the Sentencing Commission's Report indicated, reliable information comparing babies born to mothers using crack versus those born to mothers using powder are not even available, because medical tests cannot distinguish between the presence of crack as opposed to powder in a mother or newborn child.

Finally, even if crack posed a greater health risk to the American public than powder cocaine—which it does not—the increased penalties could not be justified on this basis. Cocaine powder is easily transformed into crack. All one needs is baking soda and heat.[30] Thus, to apply a stiffer penalty between cocaine which is sold directly as crack, and cocaine which is in powder form but which can be treated by the consumer and easily transformed into crack, is irrational. As the Sentencing Commission put it, "[i]n light of the fact that crack cocaine can be easily produced from powder cocaine, the form of cocaine is simply not a reasonable proxy for dangerousness associated with use."[31]

B. THE DISPARATE PENALTY CANNOT BE JUSTIFIED BY THE ALLEGEDLY GREATER VIOLENCE ASSOCIATED WITH CRACK

A typical argument offered to justify the higher penalty afforded defendants charged with violating laws prohibiting the possession or sale of crack is that there is more violence associated with the use of crack than with the use of powder cocaine. This view, like the others frequently advanced on this issue, has been shaped largely by the media and is without empirical support.

The Sentencing Commission received testimony and evidence on the relationship between cocaine and violence at its November 1993 hearing. Of the three experts who testified on the subject—including, Dr. Steven Belenko, Deputy Director, New York Criminal Justice Agency, Dr. Paul Goldstein, Associate Professor of Epidemiology at the University of Illinois at Chicago Circle, and Dr. Jerome Skolnick, Professor of Law at the University of California at Berkeley—not one of them supported increased penalties for crack cocaine defendants based on the notion that there is more violence associated with the use of crack than with the use of powder cocaine.

Professor Goldstein[32] also made a presentation during "The Experts Speak" panel of a 1993 symposium sponsored by the ACLU and the Coalition for Equitable Sen-

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[27] *See* Proffer of Dr. George Schwartz, attached to Defendant's Motion to Declare Provisions of 21 U.S.C. 844(a) Unconstitutional, *United States* v. *Maske*, 840 F. Supp. 151 (D.D.C. 1993).

[28] *See* GAO/HRD–91–55FS, Health Consequences and Treatment for Crack Abuse.

[29] *See* Linda Mayes, et al., *The Problem of Prenatal Cocaine Exposure*, JAMA V.267, No. 3, (1992).

[30] *See* U.S. Bureau of Justice Statistics, *supra* note 2, at 181.

[31] *See* Statement of the Comm'n Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy, at 4 (included in May 1, 1995 U.S. Sentencing Commission submission to House and Senate Judiciary Chairs).

[32] Professor Paul Goldstein teaches at the University of Illinois at Chicago, School of Public Health, and has authored studies probing the relationship between drugs and violence.

tencing, entitled, "Racial Bias in Cocaine Laws."[33] He explained that there are no valid and reliable sources of data for policy makers, in either the criminal justice or health care systems, that adequately explain the relationship between violence and drugs. Media reports on violence, he contended, are unclear and misleading, with distinctions between drug use and drug trafficking often not made.[34] He further stated that he has found no difference in violence between crack users and powder cocaine users; the violence that does exist relates to the drug's marketplace dynamics.[35]

To illustrate his point, Professor Goldstein divided drug-related violence into three categories: pharmacological (the drug's actual effect on the user); economic compulsive violence (where the user commits a crime to support his habit); and systemic (the violence related to the system of drug distribution). Professor Goldstein explained that his studies have revealed little pharmacological violence attributed to either powder or crack cocaine; most of drug-related violence is related to alcohol. Similarly, Professor Goldstein has found little "user-trying-to-support-his-habit" economic violence: only 2% to 8% of cocaine-related violence is of this type. He found that almost all cocaine related violence is found in the cocaine marketplace and system of distribution. "Examples of systemic violence," he explained, "include territorial disputes between rival dealers, assaults and homicides committed within particular drug dealing operations in order to enforce normative codes, punishment for selling adulterated or bogus drugs, assaults to collect drug related debts, and so on."[36]

Goldstein's findings provide evidence that certain common assumptions about drug-related violence are incorrect or exaggerated. For example, although it is commonly believed that violent, predatory acts by drug dealers to obtain money to purchase drugs is an important threat to public safety, Goldstein's data indicate otherwise. He found that violence is most likely to occur with respect to the drug marketplace, and to involve others similarly situated.

Indeed, the Justice Department itself has recognized that the common connection of drug use with crime "oversimplifies their relationship," and that "a wide range of psychological, social, and economic incentives can combine" to produce violent crimes.[37] Empirical studies of the direct relationship between crack and crime prove that in most cases the connection between the two is weak, at best. For example, a 1991 survey of state prisoners found that those who had used crack before their offense were less likely to be in prison for a violent offense than those who had used other drugs or no drug.[38] In fact, the survey found that of the percentage of prisoners who used crack in the month before their offense, 33% were incarcerated for a violent offense, compared with 39% who used powder cocaine and 48% who used any other drug.[39]

These statistics confirm that extrinsic socio-economic factors are far better indicators of crime and violence, than the use or sale of crack cocaine. While it may be tempting to believe that crack somehow has "caused" the tragic conditions which plague inner city communities, the truth appears to be the reverse: the use and sale of crack cocaine is but one unfortunate manifestation of poverty, urban neglect, and a society that seems unable to produce a response to these problems that does not include, at its core, the incarceration of huge segments of the African American community.

We are pleased, however, that the Sentencing Commission has taken an important step in the right direction. In its Report to Congress, the Sentencing Commission stated:

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[33] The Racial Bias in Cocaine Laws Symposium was co-sponsored by the ACLU, the Congressional Black Caucus Foundation, the Committee Against Discriminatory Crack Law, the Southern Christian Leadership Conference, and the Criminal Justice Policy Foundation. A complete copy of the Symposium can be ordered from C–SPAN Viewer Services, reference numbers 37649, 37650, 37651, and 37652.

[34] *See* Paul J. Goldstein, *The Relationship Between Drugs and Urban Violence: Research and Prevention Issues* (June 1993).

[35] Professor Goldstein has studied drug-related violence in New York State and New York City, funded by the National Institute on Drug Abuse and the National Institute of Justice. He believes that the figures often used in the media for drug-related violence include alcohol-related violence. He is also suspicious of police-reported "drug-related violence," having found that police often target specific areas such that any crime committed therein is "drug-related."

[36] *See* Goldstein, *supra* note 16, at 4.

[37] *See* U.S. Bureau of Justice Statistics, *supra* note 2, at 181; *see also State* v. *Russell*, 477 N.W. 2d 886, 890 (Minn. 1991) (citing Minnesota Department of Public Safety Office of Drug Policy, *Minnesota Drug Strategy 1991* at 14).

[38] *See* U.S. Bureau of Justice Statistics, Dep't of Justice, *Survey of State Prison Inmates* 23 (1991).

[39] *Id.*

> We are aware that a host of social maladies have been attributed to the emergence of crack cocaine, such as urban decay or parental neglect among user groups. After careful consideration, the Commission majority [has] concluded that increased penalties are not an appropriate response to many of these problems. We are unable to establish that these social problems result from the drug itself rather than from the disadvantaged social and economic environment in which the drug is used. We note that these problems are *not* unique to crack cocaine, but are associated to some extent with abuse of any drug or alcohol.[40] (Emphasis added.)

Finally, it is important to note that whatever differences in the relative levels of violence associated with crack and cocaine already are accounted for under the Federal Sentencing Guidelines. The current guidelines already provide for enhanced penalties for those with greater criminal histories as well as those who commit drug offenses involving firearms or other dangerous weapons, serious bodily injury or death, use or employment of juveniles, drive-by shootings, gang activity, or leadership role in the offense—to name just a few.

In fact, a Table compiled by the Commission estimating the average sentences for crack and powder cocaine offenses under a one-to-one ratio demonstrated that, despite equalization of the base sentences, many of those convicted of crack cocaine offenses nevertheless would serve much longer prison terms than those convicted of powder cocaine offenses because of the enhancements for aggravating factors. The Commission reported that:

> [E]qualizing the quantity ratio between crack and powder cocaine will not result in equal sentences for crack and powder cocaine offenders who differ in relevant ways. Commission analysis shows that, under the amended guidelines, crack offenders will receive sentences that are, on average, generally at least twice as long as powder cocaine offenders involved with the same amount of drug.[41]

The Commission's penalty enhancement approach is thus sound and persuasive because it ties increased sentences directly to the severity of the offense, rather than painting every defendant convicted of a crack cocaine offense with the same broad brush. The fact that any violence or other criminal activity associated with the distribution of crack already is accounted for under the guidelines should alleviate any apprehension Congress or the Department of Justice may have about fully endorsing the Commission's recommendations.

C. STIFFER PENALTIES FOR CRACK ARE NOT JUSTIFIED BY ITS CHEAPNESS AND AVAILABILITY

One argument advanced by various Members of Congress during debate on the Anti-Drug Abuse Acts of 1986 and 1988 is that crack cocaine must be eradicated because of its cheapness and availability.[42] We do not agree with this position. In our view, longer punishment for the use or sale of a particular drug cannot be justified on the ground that it's cheaper and therefore more likely to be used by a disadvantaged population.

To apply draconian penalties for first time possession of crack on the basis of its low cost discriminates on the basis of class, especially in light of the fact that powder cocaine, in spite of its higher expense, is a drug abused more in this country.[43] Moreover, higher penalties for crack cocaine guarantee that small time street level users will be penalized more severely than larger distributors who possess powder cocaine before it is transformed into crack. This type of drug abuse policy which disproportionately impacts lower income people is neither logical, nor fair, nor effective. The following quote puts it succinctly: "The discrimination is no less blatant than if . . . alcohol-related offenses were to be punished more severely where the liquor involved was inexpensive and more prevalent in minority communities."[44]

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[40] *See* Statement of the Comm'n Majority, *supra* note 15, at 4.

[41] *Id.* at 3.

[42] *See* 132 *Cong. Rec.* H6519 (daily ed. Sept. 10, 1986) (statement of Representative Traficant); *see also* 132 Cong. Rec. H6679 (daily ed. Sept. 11, 1986) (statement of Representative Young); 134 *Cong. Rec.* H7074–02 (daily ed. Sept. 7, 1988) (statement of Representative DeWine).

[43] *See* U.S. Bureau of Justice Statistics, *supra* note 2, at 24.

[44] *See* H. Scott Wallace, *The Sentencing Commission's Wise Crack Amendments: Still Tough, but No Added Punishment for Race and Poverty,* National Legal Aid and Defender Association (May 5, 1995).

D. ANY QUANTITY RATIO GREATER THAN EQUIVALENCY WOULD THWART THE GUARANTEE OF CONSISTENCY IN THE GUIDELINES

Any quantity ratio greater than equivalency will lead to the unfair result that more sophisticated, high-level powder distributors will be sentenced less severely than some of the retailers they supply. As the Sentencing Commission observed, the present system "results in obvious punishment inequities by providing the same penalty for 500 grams of powder (½ kilo)—yielding between 1,000 and 5,000 doses and costing up to $75,000—as for five grams of crack cocaine—yielding between ten and 50 doses and costing up to $750."

The findings of the Sentencing Commission and the conclusions it reached based on its study of the issue should be entitled to substantial deference here. The Sentencing Commission was created by Congress as an independent agency in the judicial branch with responsibility to advise Congress on sentencing policy. Moreover, all of the members of the bipartisan Commission are confirmed by the Senate and must have demonstrated expertise in the field of criminal justice. Congress, therefore, should not micromanage or second-guess the agency of experts that has done exactly what the 1994 Crime Bill directed it to do—to analyze and report on the different penalties for crack and powder cocaine offenses and to provide recommendations for retention or modification of these differences.

It has been argued that the Sentencing Commission was correct in its conclusion that the current disparity is unwarranted but that the solution should be to increase the penalty for the possession and sale of powder cocaine. This is not an appropriate response to the problem. Any arbitrary increase in the penalty levels for powder cocaine to the levels currently established for crack will simply flood the courts with more mandatory federal sentences for nonviolent, unarmed first time drug addicts. According to the National Institute on Drug Abuse, about 7,000,000 people used powder cocaine in the past year—five times the amount that used crack. No public interest will be served by attempting to incarcerate all of these people pursuant to the unduly harsh mandatory minimum provisions currently in place for those who violate laws prohibiting the use or sale of crack cocaine.

VI. Conclusion

Cocaine use, in any form, is a serious problem in this country. But, as the Sentencing Commission has recognized, it is a problem that cannot be solved by ill-considered, quick fixes. The issue here is one of fairness, involving the fundamental question of what basic principles will guide our actions and decisions in our racially and economically diverse democracy:

> . . . [T]he issue [is] one of basic fairness and a deep conviction that Government must treat each citizen fairly. It is bad enough when individuals are unfair to one another, or when we punish each other too harshly, but when the Government is perceived as not being fair or punishes one segment of society more harshly than another for the same basic conduct, serious distrust results of the criminal justice system and the Government as a whole.
>
> The Commission recognizes that cocaine is a tragic problem in this country. But it is as tragic in the boardrooms, offices, and suburbs of America as it is in the inner cities. Because people of the upper echelons of society do not live in troubled neighborhoods, they are not subject to the same enforcement or penalties as the poorer people in society.
>
> When a sentencing policy has a severe disproportionate impact on a minority group, it is important that sufficient bases exist for the policy. The law should not draw distinctions that single out some offenders for harsher punishment unless these distinctions are clearly related to a legitimate policy goal. For the reasons described above, we do not believe that a sufficient policy bases for the policy differential exists.

Neither do we. Congress should allow the Sentencing Commission's amendment to take effect. It has studied the issue thoroughly and has concluded correctly that the 100-to-1 quantity ratio is unfair irrational, and has a significant discriminatory impact on African Americans. The amendment which the Sentencing Commission has introduced to address these problems is the only reasonable and equitable approach to this issue. We urge its passage.

Appendix 3.—Statement of Erica Shields, Corrections Officer, Federal Bureau of Prisons

My name is Erica Shields and I am a Corrections Officer employed by the Federal Bureau of Prisons. Having served in military corrections and with the Bureau for over twenty-one (21) years as a case manager, case management coordinator, unit manager, discipline hearing officer, and line corrections officer, I am currently assigned to the Federal Correctional Institute at Englewood, Colorado.

While I understand that the hearings being conducted before the Subcommittee relate specifically to some Sentencing Guideline amendments recently submitted by the U.S. Sentencing Commission, I want to inform the Members of the Subcommittee generally about the sentences being imposed for Crack offenses. And I want to inform those Members about the impact that those sentences have on me and on my fellow corrections colleagues.

The brief comments that I offer here are based upon my several years of experience working within the various types or levels of institutions run by the Bureau. Additionally, I now serve as President of Local 709 of the American Federation of Government Employees Council of Prison Locals. This local union represents 240–250 of the employees who work at one of the three facilities at Englewood: the Federal Correctional Institute (a medium security prison); the Federal Detention Center (housing pre-trial detainees); and the Federal Prison Camp (a minimum security facility). While I know that each of those men and women at Englewood as well as the many others around the country have their own stories to tell, I believe that what I can summarize today reflects much of what they might say. And I appreciate this opportunity to share it.

Basically, our jobs are becoming much more dangerous. The past few years has witnessed a dramatic increase in the number of assaults on both guards and on inmates. And there has been a similar increase in the number of disturbances occurring around the country—some twelve (12) serious incidents during the last eighteen (18) months. Last December, a federal corrections officer was murdered at the penitentiary at Atlanta. Here in Colorado, we have experienced near riot conditions on several occasions at both Englewood and at the new facilities at Florence (outside of Colorado Springs). During two recent occasions, the administrators at Florence authorized bringing shotguns into the institutions to be used as necessary.

Although we all recognize that there are several reasons for the changing environment, I believe that the longer sentences being imposed for crack offenses are directly responsible for much of the increased danger to prison officials and inmates and for the increased dangerousness in prison conditions. And I believe that my colleagues locally and nationally are of the same opinion.

What we hear from you in Congress and from the Statehouses around the country is that the solution to the drug crime problem is to lock offenders up and to lock them up for very long periods of time. But then, after you write the laws, we are the ones who have to deal with the consequences of your efforts. We have to deal with the twenty-year-olds who are facing 20–30 years in prison with little or no potential for good time reduction, with no parole and, lately, with a decreasing budget for meaningful programming. We have to deal with the increasing numbers of angry young men who take out there anger and frustration on the guards and on fellow inmates.

I do not pretend to know a great deal about the real differences that might exist between crack cocaine and powder cocaine. To me and my fellow officers, drugs are basically drugs. The big difference we do see is in the racial disparity between the offenders. Black offenders seem to be punished more severely than white offenders and they talk about it a great deal and get angrier because of it. If sentences have to be longer—and they should be for some inmates that I've met then those longer sentences should be given to the more violent offenders and to those who use guns and other dangerous weapons.

And I do not pretend to know a great deal about how to solve all the problems that we face here in corrections. But I think I know something about how not to make it worse.

If we have to continue to lock more people up for longer periods of time, then give us some behavior modification tools to use to ease the tension and to control the population. We need some carrots and we need some sticks to do our job more efficiently and to make our workplace safer.

For instance, we need more latitude in providing good time rewards. The current 54 days a year is just not enough to use as incentive for appropriate behavior. And withholding that amount is just not enough of a punishment for some of the acting out that we see. I believe that some of the meritorious incentives that we used to

provide for securing a college diploma or for acts of heroism or for coming up with ideas that saved the institution a great deal of money made a great deal of sense. We rewarded behavior that we wanted others to follow and we took more than 54 days for incidents that we just would not tolerate.

And while I am on the subject, please permit me to talk a little about the downsizing of Bureau personnel. This year I understand that there are orders to cut 2400 jobs at the federal correctional institutions. There are also plans to reduce benefits and pay and to contract out corrections responsibilities to private firms. Combined with the longer prison sentences and the increasing frustration and hopelessness among the inmates, I fear that such plans will create even greater problems within our facilities within the next five (5) years. We need more seasoned, experienced staff to deal with this increasingly violent population. We need to develop ways of attracting and keeping those corrections professionals; we cannot continue to provide reasons to force them away or into early retirement.

In closing, I would like to invite any Member (or staff) who wants to more fully understand what we face each day to accompany me on my midnight to 8:00 a.m. watch at FCI Englewood. You will see me alone and armed only with a flashlight walking down corridors housing some 190 inmates with nothing at all to do at night. You will be able to experience at first hand the tension and the anger that I have talked about here and you will be able to sense the immense danger that exists all around me.

I thank you for this opportunity to share my thoughts and experiences.

Appendix 4.—Statement of Nkechi Taifa, Legislative Counsel, American Civil Liberties Union

I. Update[1]

On May 1, 1995 the United States Sentencing Commission,[2] pursuant to a specific directive contained in last year's crime bill,[3] submitted to Congress its recommendations regarding "retention or modification" of the sentencing policy between differing forms of cocaine. The Commission stated that it:

> Unanimously agrees that the current 100-to-1 quantity ratio [between crack and powder cocaine] found in the mandatory minimum penalty statutes, and replicated in the current sentencing guidelines, cannot be recommended and should be changed. Further, the Commission unanimously believes that. the current five-year mandatory minimum for simple possession of crack cocaine should be reconsidered.[4]

In addition to unanimously advocating the equalization of penalties between crack and powder cocaine possession in the U.S. Sentencing Guidelines and in their recommendations to Congress, a majority of the Commissioners also voted to equalize the sentences of cocaine distribution.[5]

II. Early Legislative History

The sentences for possession and distribution of cocaine base (crack)[6] are 100 times greater than for powdered cocaine. This is commonly referred to as a "100-to-1" quantity ratio. In other words, five grams of crack cocaine carries the same penalty as 500 grams of powder cocaine. Congress passed these laws in 1986 and 1988, making policy without careful study, and with tragic and costly consequences. It hastily enacted the 100-to-1 ratio between crack and powder cocaine in August 1986 without taking testimony of cocaine/crack pharmacology, prison capacity, impact on courts and prosecutorial caseloads, or on appropriate sentences for the two forms of the drug.

The Anti-Drug Abuse Act of 1988 amended 21 U.S.C. 844 to make crack cocaine the only drug with a mandatory minimum felony penalty of at least five years for a first time offender's simple possession.[7] The minimum sentence for possessing the same quantity of powder cocaine is probation. Indeed, the penalty for first time possession of any other drug, including powder cocaine, is a misdemeanor not exceeding one year. As originally introduced, the 1988 bill did not contain mandatory minimum penalties for possession of crack cocaine. These penalties were added in floor action in both the House and Senate.[8] Relatively little debate surrounded the proposals to attach mandatory minimum penalties to simple possession of crack cocaine.

The media played a large role in creating the national sense of urgency surrounding drugs, generally, and crack cocaine specifically. In the months leading up to the 1986 elections, more than 1,000 stories appeared on crack in the national press.[9] Perhaps the best example of sensationalized media coverage surrounded the death

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[1] This memorandum updates the ACLU's June 25, 1993 memorandum on this issue.

[2] The U.S. Sentencing Commission is an independent agency in the judicial branch with responsibility to advise Congress on sentencing policy. The members of the bipartisan commission are confirmed by the Senate and are recognized experts in the field of criminal justice.

[3] *See* Violent Crime Control and Law Enforcement Act of 1994. Public Law 103–322, Sec. 280006.

[4] *See* Letter to the Honorable Orrin Hatch, Chairman, Senate Judiciary Committee, from Richard Conaboy, Chairman, U.S. Sentencing Commission May 1, 1995. *See also, U.S. Sentencing Commission Special Report to Congress: Cocaine and Federal Sentencing Policy,* (February 1995), (hereinafter, "U.S. Sentencing Commission Special Report to Congress").

[5] The Commission's majority included Chairman Richard Conaboy, Vice Chair David Mazzone, Wayne Budd, and Michael Gelacak.

[6] "Crack" is the street term for cocaine base. Crack is easily manufactured by heating cocaine hydrochloride (powdered cocaine) and baking soda on a stove top. *See* Department of Justice, Bureau of Justice Statistics, *A National Report,* "Drugs, Crime and the Justice System," Dec. 1992, NCJ–133652, p. 181 (hereinafter, "Bureau of Justice Statistics, Dec. 1992").

[7] A mandatory minimum sentence of 5 years and a maximum of 20 years for possession of: 5 grams of crack for a first conviction; 3 grams for a second conviction; 1 gram for a third conviction. *See* 21 U.S.C. 844(a).

[8] *See* 134 Cong. Rec. H.7,704 (Sept. 16, 1988) (Statement of Rep. Shaw); 134 Cong. Rec. S17,320 (Oct. 21, 1988) (Statement of Sen. Helms).

[9] *See* U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy,* February 1995, p. 122.

of University of Maryland basketball star Len Bias in 1986, who died of cocaine intoxication the day after he was drafted into the National Basketball Association. Following the death of Bias, newspapers across the country reported that Bias "probably died of 'freebasing' cocaine." This information was stated as being instrumental in the development of the federal crack cocaine laws. Not until a year later did the public find out in testimony that Bias had died of snorting powder cocaine.

III. The Distinction Has a Disproportionate Impact on Race

Federal sentencing data leads to the inescapable conclusion that Blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine.[10]

In 1992, 91.3% of those sentenced federally for crack offenses were Black, while only 3% were White.[11] In 1993, 88.3% were African American, while 4.1% were Caucasian.[12] Although the National Household Survey on Drug Abuse reports that 91% of those who had used cocaine in 1990 sniffed or snorted it as compared with 31% who smoked it,[13] and that the greatest number of documented crack users are White,[14] the "war on drugs" has been disproportionately targeted at inner city Black communities. This has caused an overwhelming number of prosecutions directed against the 31% who smoke cocaine in crack form, resulting in a vastly disproportionate number of African Americans convicted and incarcerated.

A Department of Justice commissioned study on federal sentencing policies disclosed that between 1986 and 1990, both the rate and average length of imprisonment for federal offenders increased for Blacks in comparison to Whites, and that the higher proportion of Blacks charged with crack offenses was "(t)he single most important difference accounting for the overall longer sentences imposed on Blacks, relative to other racial groups."[15] The study's analysis concluded the following:

> If legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study's analysis suggests that the Black/White difference in sentences for cocaine trafficking would not only evaporate but would slightly reverse.[16]

IV. The Reasons for the Distinction Are Unjustified

Three reasons are often cited for the gross distinction in sentencing between powder and crack cocaine: addictiveness and dangerousness, violence, and accessibility due to low cost. All of these reasons fail as a justification for the 100-to-1 ratio in punishment between two methods of ingesting the same drug.

A. Stiffer Penalties for Crack Are Not Justified Because of Dangerousness

Disparate treatment in sentencing between crack and powder cocaine users is not justified on the basis of the alleged greater dangerousness of crack.

Cocaine hydrochloride (powder) can easily be transformed into crack by combining it with baking soda and heat. *Thus, to apply a stiffer penalty between cocaine which is directly sold as crack and cocaine which is sold in powder form but which can be treated by the consumer and easily transformed into crack, is irrational.* Cocaine can also be injected by dissolving cocaine powder in water and administering it intravenously. The effect on the body of injecting liquefied cocaine is similar to the effect of smoking crack cocaine.[17] According to Dr. George Schwartz an expert in

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[10] *See* U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy*, February 1995, p. xi.

[11] *See* United States Sentencing Commission, 1992 Data Files, MONFY 92, Table 31, "Race of Defendant by Drug Type," October 1991 through September 30, 1992.

[12] *See* United States Sentencing Commission, *Special Report to Congress* p. 156, and Table 13, "Race of Drug Trafficking Defendanta," October 1, 1992 through September 30, 1993.

[13] *See* Bureau of Justice Statistics, Dec. 1992, *supra* at 24.

[14] *See* National Institute for Drug Abuse National Household Survey on Drug Abuse, Population Estimates 1991, Revised, Nov. 20, 1992, Table 5–B, 5–C, 5–D.

[15] *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter?* (Nov. 1993). *See also* U.S. Sentencing Commission Special Report to Congress, pg. 162.

[16] *Id* at 2.

[17] The onset of drug effects is slowest for swallowing and sniffing and fastest for smoking and injection. Intravenous injection deposits drugs directly into the blood that is carried to the brain. Drugs inhaled in smoke are absorbed by blood vessels in the lungs and carried to the brain. *See* Bureau of Justice Statistics, *supra* at 24.

emergency medicine, there is no objective scientific data to support a suggestion that crack is more addictive or dangerous than powder. In fact, he explains, from a medical standpoint, cocaine powder is a much more dangerous drug because three times as many deaths are reported from snorting cocaine.[18] Likewise, from a public health perspective, injecting cocaine increases the threat of infections.[19]

B. STIFFER PENALTIES FOR CRACK ARE NOT JUSTIFIED BECAUSE OF VIOLENCE

It has been asserted that there is more violence associated with the use of crack than with the use of powder cocaine. There is no evidence, however, that such violence is attributed to the pharmacological effects of smoking crack. Extrinsic socio-economic factors have commonly been the indicators of crime and violence as opposed to any factors intrinsic to crack. A report issued by the Department of Justice Bureau of Justice Statistics represented that the connection of drug use with crime "oversimplifies their relationship," and that "a wide range of psychological, social, and economic incentives can combine" to produce violent crime.[20]

In its Report to Congress, the U.S. Sentencing Commission stated:

> We are aware that a host of social maladies have been attributed to the emergence of crack cocaine, such as urban decay or parental neglect among user groups. After careful consideration, the Commission majority concluded that increased penalties are not an appropriate response to many of these problems. We are unable to establish these social problems result from the drug itself rather than from the disadvantaged social and economic environment in which the drug is used. We note that these problems are *not* unique to crack cocaine, but are associated to some extent with abuse of any drug or alcohol.[21] (Emphasis added.)

C. STIFFER PENALTIES FOR CRACK ARE NOT JUSTIFIED BY ITS CHEAPNESS AND ACCESSIBILITY

During debate on the Anti-Drug Abuse Acts of 1986 and 1988, various Members of Congress argued that crack cocaine must be eradicated because of its cheapness and availability.[22] The fact that crack is cheaper, however, is no reason to target it for more intrusive sanctions. To apply draconian penalties for crack cocaine offenses on the basis of low cost discriminates on the basis of class, especially in light of the fact that powder cocaine, in spite of its higher expense, is a drug abused more in this country.[23]

Furthermore, higher penalties for crack cocaine guarantee that small time street level users in inner city communities will be penalized more severely than larger distributors who possess powder cocaine before it is transformed into crack.[24] This type of drug abuse policy which disproportionately impacts lower income people and people of color is neither logical nor effective. The following quote puts it succinctly: "The discrimination is no less blatant than if . . . alcohol-related offenses were to be punished more severely where the liquor involved was inexpensive and more prevalent in minority communities."[25]

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[18] *See* Proffer of Drug George Schwartz, attached to Defendant's Motion to Declare Provisions of 21 U.S.C. 844(a) Unconstitutional, *United States* v. *Maske*, Cr. No. 92–0132–01 (TFH) (D.D.C.).

[19] *See* GAO/HRD–91–55FS "Health Consequences and Treatment for Crack Abuse."

[20] *See* Bureau of Justice Statistics, Dec. 1992, *supra* at 2. *See also State* v. *Russell*, 477 N.W. 2d 886 (Minn. 1991), at 890, citing Minnesota Department of Public Safety Office of Drug Policy, *Minnesota Drug Strategy* 1991, p. 14.

[21] *See* Statement of the Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy, p. 4 (included in May 1, 1995 U.S. Sentencing Commission submission to House and Senate Judiciary Chairs).

[22] *See* statement of Representative Traficant, 132 Cong. Rec. H6519 (daily ed. Sept. 10, 1986). *See also* statement of Representative Young of Florida, 132 Cong. Rec. H6679 (daily ed. Sept. 11, 1986); statement of Representative DeWine of Ohio, 134 Cong. Rec. H7074–02 (daily ed. Sept. 7, 1988).

[23] *See* Bureau of Justice Statistics, Dec. 1992, *supra*, at 24.

[24] *See* U.S. Sentencing Commission Special Report to Congress; Cocaine and Federal Sentencing Policy, February 1995, p. xii-xiii.

[25] *See* "The Sentencing Commission's Wise Crack Amendments: Still Tough, but No Added Punishment for Race and Poverty," by H. Scott Wallace, National Legal Aid and Defender Association, May 5, 1995.

V. Recent Legislative History

In the 103rd Congress, Representative Charles Rangel (D–NY) introduced H.R. 3277 to eliminate the disparity and make the sentences of those convicted of crack cocaine offenses equivalent to the current sentences for powder cocaine. This legislation was later incorporated into "The Crime Prevention and Criminal Justice Reform Act" (H.R. 3315) introduced in the 103rd Congress, and was offered by Rep. William Hughes (D–NJ) as an amendment to "The Violent Crime Control and Law Enforcement Act" (H.R. 3355). The original Hughes amendment, however, was replaced with a provision adopted unanimously by the U.S. House of Representatives and later signed by President Clinton as part of the 1994 Crime Bill. The provision directed the Sentencing Commission to study the issue and submit a report to Congress on the differing penalty levels between powder and crack cocaine by the end of the year. Congressman Rangel reintroduced the "Crack-Cocaine Equitable Sentencing Act" as H.R. 1264 in the 104th Congress.

VI. Action by the U.S. Sentencing Commission

After meticulously examining the facts surrounding the disparity, the Sentencing Commission on February 28, 1995 issued its Special Report to Congress on "Cocaine and Federal Sentencing," unanimously agreeing that the disparity was far too great and should be reconsidered. The Commissioners, however, at that time declined to submit specific recommendations to Congress as to what the ratio should be, stating that it would do so by May 1996. The Commission subsequently resolved to move that date up one year and, on May 1, 1995, transmitted to Congress an amendment to its sentencing guidelines to equalize the penalties between crack and powder cocaine. The Commission also recommended that Congress equalize the statutory cocaine penalties. (The guideline amendment will go into effect November 1, 1995, unless Congress opposes it.) The Commission also submitted to Congress proposed legislation, (The Cocaine Penalty Adjustment Act of 1995) to harmonize the crack penalty statutes with the guideline amendments.

The Commission's bill essentially parallels the Rangel bill. It is important to note that the Commissioners unanimously agreed that the penalty for simple possession of crack and powder cocaine be equal. The majority prevailed that the penalty for trafficking should be equal as well. The only dissenting Commissioner to provide an alternative ratio stated that a five-to-one ratio "may be a good starting point for analysis."[26]

VII. Department of Justice Opposition

The Department of Justice has opposed the Commission's recommended changes and has vowed to lobby against them. One of the Department's stated arguments is that the distribution of crack to the "most vulnerable members of society contribute[s] heavily to the deterioration of neighborhoods and communities."[27] While there is no question that the drug trade, particularly crack has wreaked havoc in communities across this country, the Commission has already adequately addressed the concern of any increased violence by adding enhancements to the sentences of those persons involved in aggravating circumstances surrounding drug deals; such as the use of a weapon, assault, coercion, drive-by shootings, or gang activity, to name a few.

Indeed, a Table compiled by the Commission estimating what the average sentences for powder and crack offenses would be under a one-to-one ratio produced some interesting results. Despite equalization of the base sentences, the Table demonstrates that many of those convicted of crack cocaine offenses will nevertheless serve much longer prison terms than those convicted of powder cocaine offenses because of the enhancements for aggravating factors such as violence or weapons use. The Commission emphasized:

> (E)qualizing the quantity ratio between crack and powder cocaine will not result in equal sentences for crack and powder cocaine offenders who differ in relevant ways. Commission analysis shows that, under the amended guidelines, crack offenders will receive sentences that are, on average, gen-

[26] *See* View of Commissioner Goldsmith Dissenting, In Part, From Amendment Five and Related Legislative Recommendation (included in May 1, 1995 U.S. Sentencing Commission submission to House and Senate Judiciary Chairs).

[27] *See* Letter to The Honorable Al Gore, President, U.S. Senate, from Kent Markus, Acting Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, May 12, 1995, p. 1.

erally at least twice as long as powder cocaine offenders involved with the same amount of drug.[28]

The Commission's penalty enhancement approach is rational, as it directly ties increased sentences to the severity of the offense, as opposed to sentences which paint every defendant convicted of a crack cocaine offense with the same broad brush.

These results should serve to alleviate any apprehension Congress or the Department of Justice may have about fully endorsing the Commission's recommendations.

VIII. Conclusion

In sum, the U.S. Sentencing Commission was created by Congress as an independent agency in the judicial branch with responsibility to advise Congress on sentencing policy. The members of the bipartisan Commission are confirmed by the Senate and have to have demonstrated expertise in the field of criminal justice. Congress must not micromanage the agency of experts which has done exactly what the 1994 crime bill directed it to do: analyze and report on the differing penalties for crack and powder cocaine offenses and to provide recommendations for retention or modification of these differences. Congress should put politics aside and accept the advice of the experts it directed to advise them on this issue.

[28] *See* Statement of the Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy, (included in U.S. Sentencing Commission May 1, 1995 submission to House and Senate Judiciary Chairs).

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